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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,
Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*,
and MELLON MORTGAGE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a nationwide class action settlement purporting to resolve the money damages claims of the plaintiff class, were absent class members improperly denied a right to opt out under Federal Rule of Civil Procedure 23 or the Due Process Clause of the Fifth Amendment?

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Crehan and Suzanne Crehan hereby petition for a writ of certiorari to review a ruling that is in conflict with decisions of other courts of appeals and of this Court. Petitioners sought to opt out from a class action settlement to pursue their money damages claims against respondent Mellon Mortgage Company, but the settlement did not allow opt-outs and the court of appeals held that an opt-out right was not required by Federal Rule of Civil Procedure 23 or the Due Process Clause. In *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), this Court granted certiorari on the due process issue, but later dismissed the writ as improvidently granted principally on the ground that,

if possible, the Rule 23 question—which was not presented in *Ticor*—should be considered first in order to avoid deciding the constitutional question. This petition permits the Court to do what it was unable to do in *Ticor*: consider whether Rule 23 requires that class members be accorded the right to opt out on their money damages claims and, if not, whether the Constitution guarantees that right.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 64 F.3d 1171 (8th Cir. 1995), and is reproduced in the appendix at Pet. App. 1a. The unreported decision of the United States District Court for the District of Minnesota approving the class action settlement is reproduced in the appendix at Pet. App. 14a. A separate unreported decision of the district court regarding attorneys' fees is reproduced at Pet. App. 18a.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. Petitioners filed a timely petition for rehearing on September 11, 1995, which was denied by the court of appeals on October 25, 1995 (Pet. App. 20a). On January 15, 1996, Justice Thomas granted petitioners' application for an extension of time to file this petition up to and including February 22, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the appendix (Pet. App. 21a).

STATEMENT OF THE CASE

This case involves the settlement of a nationwide class action brought on behalf of present and former customers of respondent Mellon Mortgage Company, one of the nation's largest servicers of mortgage loans. Plaintiffs alleged that Mellon overcharged its customers by requiring them to maintain an excessive escrow account balance in violation of state and federal law. Under the settlement, the class receive a total of $105,000 in damages (less than $1 per class member), class counsel receive $290,000 in attorneys' fees and costs, and Mellon formally implements certain "modified" escrow practices. Mellon's "modified" escrow practices are not new practices, however. Rather, the settlement rewrites each class member's individual mortgage contract to conform the contracts to Mellon's past practices and to allow Mellon to retain *more* in escrow than it had been contractually permitted to retain at the time the suit was filed. Moreover, the escrow practices approved by the settlement are at odds with escrow practices permitted under HUD regulations effective May 24, 1995. *See* 24 C.F.R. §§ 3500.17(c)(4)-(6), (d) (1995).

For purposes of this petition, however, the terms of the settlement are less significant than the important question of federal law that is starkly presented here. Although this suit presented routine consumer claims for monetary damages, the court of appeals affirmed certification of a mandatory, non-opt-out class under Federal Rule of Civil Procedure 23(b)(2). As a result, class members who wished to retain their previous, bargained-for mortgage contracts, and/or to pursue their money damages claims independently, were prohibited from doing so. The question presented here is

whether it was lawful to deny the class members their right to opt out.

1. Escrow Account Practices.

Escrow accounts typically are maintained to enable the mortgage servicer to be sure that the taxes, insurance, and other expenses of the homeowner are paid when they come due. When the mortgage servicer maintains an excess cushion in an escrow account, it receives the equivalent of an interest-free loan from the customer on the excess amount. The practice of requiring and holding excessive escrow account deposits has been widely criticized as illegal. *See Overcharging on Mortgages: Violations of Escrow Account Limits By the Mortgage Lending Industry—A Report by the Attorneys General of California, Florida, Iowa, Massachusetts, Minnesota, New York and Texas* (April 24, 1990) (*"Attorneys General Report"*); *Village Savings Bank v. Caplan*, 451 N.Y.S. 2d 159 (N.Y. App. Div. 1988) (contract-based claim raised as defense to mortgage foreclosure).

Two practices in particular—"preaccrual" and "individual-item analysis"—inflate escrow account deposits held on reserve. "Preaccrual" refers to the practice of requiring the borrower to deposit amounts to cover expenses up to a full two months in advance of their disbursement date. Under "individual-item analysis," the mortgage servicer sets up separate sub-accounts for each escrow item and requires the borrower to maintain a balance in each subaccount sufficient to cover that individual expense, even if the aggregate account balance would cover each expense as it comes due. Individual-item analysis results in a mortgage servicer generating a larger total cushion than it could under an aggregate accounting method. Section 10 of

the Real Estate Settlement Procedures Act ("RESPA") limits the amount of "cushion" a lender may require to be held in an escrow account to no more than 1/6 of the total yearly amounts needed to pay taxes, insurance premiums, and other like expenses, in effect, a two-month reserve. *See* 12 U.S.C. § 2609.

2. Procedural History.

Respondent Gretchen DeBoer filed a class action suit against respondent Mellon in Minnesota state court in August 1992, alleging three state-law causes of action (breach of contract, misrepresentation, breach of fiduciary duty) and a violation of section 10 of RESPA, 12 U.S.C. § 2609. The class included both former and present customers of Mellon. Eighth Circuit Joint Appendix ("JA") 227-28. The complaint described a systematic extraction of monies from class members, "depriv[ing] homeowners of millions of dollars." JA 189. The prayer for relief sought compensatory damages in the form of "a refund of any excess balances plus interest;" declaratory and injunctive relief; attorneys' fees and costs; and other relief as appropriate. JA 193.

The vast majority of Mellon's customers have one of two common types of mortgage contracts: Federal National Mortgage Association ("Fannie Mae") or Federal Housing Administration/ Veterans Administration ("FHA/VA"). *Cf. GMAC Mortgage Corp. v. Stapleton*, 603 N.E.2d 767, 770 (Ill. App. Ct. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993). Where these mortgage contracts limit or bar preaccrual, the contracts control. *Attorneys General Report* at 14-15. Although the record does not reveal the type of mortgage held by DeBoer, the complaint acknowledges that some class members enjoyed a contractual right to maintain escrow reserves lower than the two-month RESPA

maximum, and it sought an injunction prohibiting Mellon from requiring an escrow reserve "in excess of the cushion authorized by the underlying mortgage contract *or* the RESPA ceiling, *whichever is less.*" JA 193 (emphasis added).

On September 1, 1992, Mellon removed the action to the United States District Court for the District of Minnesota under 28 U.S.C. § 1441(a) and (b), based on the single federal cause of action pleaded, and answered the complaint. JA 181-83, 194-96. More than one year passed without any formal discovery and without the filing of a single pleading or motion of any kind. JA 4 (docket entries). Then, on October 29, 1993, respondents sought certification of a settlement class under Rules 23(b)(1) and (b)(2) and preliminary approval of the proposed settlement.

3. Terms of the Settlement.

The settlement has three principal components: payment of less than $1 in damages to each class member; an award of attorneys' fees that is nearly three times the damages; and adoption of certain escrow practices by Mellon. Rather than reforming the illegal escrow practices denounced in the original complaint, the settlement authorizes escrow practices even more favorable to Mellon than those permissible prior to the commencement of the lawsuit. *First*, the settlement permits Mellon to apply individual-item and preaccrual escrow practices to all customers, regardless of the terms of their mortgage contract. *Second*, the settlement amends all mortgage documents to allow Mellon to hold *the greatest* of the following: (1) the amount calculated using preaccrual and individual-item analysis; (2) the amount provided in the customer's mortgage documents; or (3) the maximum amount

permitted by RESPA, *i.e.*, a two-month reserve. JA 229-32.[1]

Despite the class plaintiffs' attack on preaccrual and individual-item analysis escrow practices in the complaint, the settlement agreement formally institutes both. For customers with Fannie Mae mortgages—a substantial percentage of the class, *see GMAC Mortgage Corp.*, 603 N.E.2d at 770 (forty percent of typical class had Fannie Mae mortgages)—the settlement eliminates favorable contractual terms which appear to forbid preaccrual of any reserve. JA 32; *accord Attorneys General Report* at 14. FHA/VA mortgages limit preaccrual to a one-month reserve. JA 33. Under the settlement, however, Mellon is permitted to maintain the legal RESPA ceiling of a two-month escrow reserve on deposit, regardless of the class member's mortgage contract terms. JA 230-31.

The settlement agreement did not permit class members to opt out, which is of critical concern to petitioners here, who had earlier filed suit against respondent Mellon in federal court in Virginia, alleging that its escrow practices violated federal and Virginia law. *Crehan, et al. v. Mellon Mortgage Co.*, No. 93-1017-A (E.D. Va. 1993), Eighth

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[1] The settlement also requires that Mellon automatically refund certain excess reserves, JA 230, rather than give customers the choice between an automatic refund or a credit to their account. Automatic refunding cannot be considered a material part of the settlement because it was Mellon's standard practice for a year prior to settlement, Pet. App. 12a, and is mandatory under federal regulations effective May 24, 1995. 24 C.F.R. § 3500.17(f)(2). Any claims by class members relating to Mellon's prior failure to refund excess escrow amounts automatically are essentially claims for past money damages.

Circuit Supplemental Appendix ("SA") 117-30. Although that suit was dismissed on the ground that petitioners did not state a federal cause of action, SA 128, the dismissal was without prejudice to reinstituting suit on the state claims in state court. SA 130.[2] The settlement agreement, however, specifically mentions petitioners' Virginia suit by name, JA 245, and purports to extinguish it, thus barring petitioners from pursuing their own litigation.

4. Decisions Below.

On May 23, 1994, the district court held a five-minute fairness hearing. JA 9-15. Petitioners Michael and Suzanne Crehan did not personally travel to Minnesota, but filed a written request to opt out of the settlement so that they could pursue their Virginia litigation and also objected to the settlement's unfairness. JA 25-48. Several other class members requested exclusion from the class and/or submitted objections. JA 49-64. Nevertheless, in a brief opinion entered on June 15, 1994, the district court approved certification of the class, the fairness of the settlement, and the award of attorneys' fees. Pet. App. 14a-19a. Although the final order did not state under which subsection of Rule 23 certification was granted, the preliminary order, which permitted the notice of the proposed settlement to be sent to the class members, indicated that certification was sought only under Rules 23(b)(1) and (b)(2). JA 250.

The Eighth Circuit affirmed the approval of the settlement and the non-opt-out class certification. As to class certification, the court held that Rule 23(a)'s requirements

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[2] The Fourth Circuit summarily affirmed the dismissal. *Crehan, et al. v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

had been met. It brushed aside concerns about commonality and typicality by finding that "all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some class members have different mortgage contracts." Pet. App. 5a. The court of appeals thus ignored the significant difficulties of certifying a class that fails to distinguish among differently situated class members (*e.g.*, those with Fannie Mae mortgages versus those with FHA/VA mortgages). Furthermore, the Eighth Circuit overlooked the thousands of class members who are *former* customers of Mellon—such as petitioners—and thus have no interest (common or otherwise) in Mellon's *future* escrow practices.

Turning to Rule 23(b), the court of appeals proceeded from the premise that "[w]hen either subsection (b)(1) or (b)(2) is applicable . . . (b)(3) should not be used." Pet. App. 6a. According to the court, because the complaint had sought injunctive relief, whether or not it also sought damages, certification under Rule 23(b)(2) was appropriate: "The fact that [damages were] sought incidentally to the prayer for injunctive relief does not affect this result." Pet. App. 7a. Asserting that the interests in judicial economy, efficiency, and mass resolution of small claims outweigh any potential unfairness to petitioners, the court of appeals disposed of all Rule-based arguments concerning the need for a 23(b)(3) opt-out class. Pet. App. 7a.

Proceeding to the constitutional issue, the Eighth Circuit held that "we are not presented with any due process problems in the composition of a mandatory class," despite the fact that absent class members were denied the right to opt out from a settlement involving money damages that extinguished private contractual arrangements. Pet. App. 7a.

In considering whether this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), guaranteed petitioners a right to opt out, the Eighth Circuit held that, despite their request to opt out, petitioners had objected to the settlement and thus "ha[d] waived any potential due process requirement that would allow them to pursue their claims again in another forum." Pet. App. 8a.

Finally, although acknowledging a dearth of factual findings by the district court, Pet. App. 10a, the court of appeals affirmed the approval of the settlement. It found that an automatic refunding procedure that Mellon had instituted more than a year prior to the settlement, and which is required by federal regulations in effect at the time of the court of appeals' decision, to be the primary benefit secured by the settlement. Pet. App. 12a-13a; *see supra* note 1.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Decision Denying Petitioners The Right To Opt-Out To Pursue Their Claims For Money Damages Is In Conflict With Decisions Of Other Courts Of Appeals And Of This Court

In *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994) (per curiam), this Court granted certiorari to decide whether, in a federal class action, "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Id.* at 1361. After briefing and oral argument on the merits, the Court dismissed the writ as improvidently granted, principally on the ground that the constitutional question should not be reached if, under the Federal Rules of Civil Procedure, class actions seeking monetary damages may be

certified only under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. *Id.*; *see generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Because there was a "substantial possibility" that Rule 23(b)(3) did provide such a right, *Ticor*, 114 S. Ct. at 1361, the Court decided that issuing a constitutional ruling would run counter to the established practice of deciding potentially dispositive non-constitutional questions prior to considering a constitutional issue, *id.*, and might result in "a constitutional rule that is good for no other federal class action." *Id.* at 1362.[3]

Thus, this case presents an ideal vehicle for considering both issues raised in *Ticor*, and for doing so in accordance with this Court's time-honored practice of addressing non-constitutional issues prior to constitutional issues. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979).

1. Rule 23.

Under the certification procedure of Federal Rule of Civil Procedure 23, all classes must meet the numerosity, commonality, typicality, and adequacy of representation prerequisites of Rule 23(a). In addition, the class must meet the requirements of at least one subsection of Rule 23(b), with subsection (b)(3) providing substantially more protection to absent class members than (b)(1) or (b)(2). Under the latter subsections—which apply principally to cases seeking

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[3] The question whether Rule 23 provided the absent class members in *Ticor* a right to opt out had been resolved adversely to the class in a prior unreported decision of the Third Circuit, and was not presented by the respondents in this Court or in the courts below. 114 S. Ct. at 1361-62.

injunctive or other forms of equitable relief—class members are not entitled to individual notice and an opportunity to opt out. *See Ticor*, 114 S. Ct. at 1361.

Certification under Rule 23(b)(3) is available in cases seeking monetary relief where a class action would save time, effort, and money, and would promote uniformity. *Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 102-03 (1966). However, because class actions for damages under subsection (b)(3) are likely to present differences among class members who might want to control their own litigation, in any class action maintained under subsection (b)(3), individual notice must be sent to all class members who can be identified with reasonable effort. The notice must advise them that they have the right to exclude themselves—or to opt out—from the action, as well as to intervene or otherwise participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2). Accordingly, subdivision (b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment. *See generally Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *see also Rules Advisory Committee Notes*, 39 F.R.D. at 106-07 ("[N]otice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." (*citing, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940)); *Eisen*, 417 U.S. at 173-76 (similar). The quintessential Rule 23(b)(3) class action is one in which the class members seek money damages. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

The court of appeals here did not dispute that the class action complaint and settlement concerned substantial claims for monetary damages. Rather, the court simply held that, where certification is appropriate under subsection (b)(3) or subsection (b)(2)—the subdivision concerning claims involving injunctive and declaratory relief—it is preferable to certify the case under subsection (b)(2). Pet. App. 7a-8a.

This holding stands in stark contrast to the rulings of other courts of appeals. For instance, in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the court certified a class action pursuant to Rule 23(b)(2). *Id.* at 1152. However, the court recognized that opt-out rights must be accorded with respect to the class members' monetary claims, even though they had no opt-out rights with respect to injunctive and declaratory relief. *Id.* at 1156-57. Similarly, in the Ninth Circuit, in cases where certification under (b)(2) is appropriate with respect to injunctive relief, the damages aspects are certified pursuant to Rule 23(b)(3) to protect opt-out rights. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975).[4]

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[4] In the past, the Ninth Circuit has upheld exclusive (b)(2) certification where claims for monetary relief were joined with claims for injunctive relief, but has done so only where the money remedy was "incident to" and did not "predominate" over the claims for injunctive relief. *See, e.g., Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *modified on other grounds sub nom., Califano v. Yamasaki*, 442 U.S. 682 (1979). These decisions were issued prior to the Ninth Circuit's ruling in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), discussed *infra* at 1-2, 10-11, 17-18, which held that due process requires

(continued...)

Similarly, in *Penson v. Terminal Transport Co.*, 634 F.2d 989 (5th Cir. 1981), the Fifth Circuit recognized the importance of class members' retaining individual control over their money damages claims, and thus allowed class members to opt out in a Rule 23(b)(2) class action. *Id.* at 994. When individual monetary relief is sought, the court stated, the case "begins to resemble a 23(b)(3) action and there has been more concern [there] with protecting the due process rights of the individual class members . . . ." *See also Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 559, 565 (2d Cir. 1968).[5]

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[4](...continued)
that class members with damages claims be afforded the opportunity to opt out. In any event, these earlier cases tend to be civil rights actions in which the homogeneity of the class and the nature of the relief sought—back pay—have been found to justify (b)(2) treatment. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *see also Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 252-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (identifying need for judicial economy, consistency of result and effective binding nature of adjudication in civil rights action for "group" injuries); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1259-60 (5th Cir.)(same), *cert. denied*, 434 U.S. 822 (1977).

[5] The Eighth Circuit's view is also inconsistent with that of the leading class action treatise, which maintains that, where both damages and injunctive relief are present and there is a question as to which type predominates, the district court should protect absent class members by, for example, certifying the damages portion of the class under Rule 23(b)(3) or by certifying the injunctive portion alone, leaving the damages for individual determination. 1 *Newberg on Class Actions* § 4.14, at 4-51 - 4-52 (3d ed. 1992).

In this case, there was no legitimate basis for exclusive Rule 23(b)(2) certification. First, the predominant claim for relief, and certainly the predominant feature of the settlement, was resolution of the class members' individual money damages claims. Thus, the settlement has a *res judicata* effect not only as to the highly individualized claims concerning excess escrow retention (which differed based on mortgage contract type, amount of time the mortgage was held, and applicable state and federal law, among other things), but also claims that could have been asserted in the litigation, such as those made by petitioners for special compensatory damages and punitive damages. SA 123-26 (describing petitioners' fraud claims).

More importantly, the "injunctive relief" contained in the settlement does not stop Mellon from doing anything. Rather, it *permits* Mellon to choose among three methods of escrow retention, one of which is based on the interpretation of applicable law most favorable to Mellon, going so far as to reform the class members' contracts to allow Mellon to demand greater escrow payments than it could have at the inception of the suit. Settlement Agreement at ¶ 10, JA 229-32.

Second, the class consists of a large and identifiable subset of *former* Mellon customers who have no legitimate claim for injunctive relief. For *former* customers, their only conceivable claim is for monetary damages. The actual rebate portion of the settlement was so small that for many of them the cost of a postage stamp for mailing the claim form would exceed the amount of their rebate. With respect to these former customers, the Eighth Circuit's ruling is flatly contradicted by the language of Rule 23(b)(2) itself—which is limited to claims for "final injunctive . . . or

corresponding declaratory relief"—and is irreconcilable with the rulings of other circuits discussed above.

Third, even assuming that Mellon's "agreement" to obey the law could somehow be construed as injunctive relief, under precedents from the Fifth, Ninth, and Eleventh Circuits, a Rule 23(b)(2) certification should not be permitted to override petitioners' opt-out rights with respect to their damages claims. But, if as respondents maintain and the Eighth Circuit held, exclusive certification of this case under Rule 23(b)(2) is supportable simply because it is more "efficient" than allowing the opt-out rights accorded under subsection (b)(3), Rule 23(b)(2) would be available in virtually all class actions in which any request for "injunctive relief" is included, thereby obliterating the carefully constructed differences among the sub-parts of Rule 23.

For these reasons, the ruling below is at odds with the holdings of other courts of appeals which have properly considered the structure of the Rule and have recognized that sweeping interpretations of the other subsections of Rule 23(b) would negate the important protections for individual class members under Rule 23(b)(3). *See In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) ("[I]f compensatory damages actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)."); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (expansive interpretation of Rule 23(b)(1)(A) would render Rule 23(b)(3) "superfluous"), *cert. denied*, 425 U.S. 911 (1976). Indeed, unrestrained certification under the other subdivisions of Rule 23(b) is at odds with the Court's analysis in *Eisen*, which,

despite its assumption that the case was properly certified under subdivision (b)(3), stressed the importance of Rule 23(b)(3)'s structural protections of individual rights. 417 U.S. at 173, 176-77.

2. Due Process.

The court of appeals' decision upholding the mandatory class action settlement—and, thus, denying petitioners' right to opt out on their claims for money damages—is also in conflict with the decision of the court of appeals in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). There, the Ninth Circuit held that, where substantial claims for monetary damages are involved, despite the presence of a claim for injunctive relief, absent class members must, under the Fifth Amendment's Due Process Clause, be given the right to opt out and to pursue their money damages claims. *Id.* at 392.

In *Ticor*, the Ninth Circuit lifted a district court injunction against the prosecution by a class of Arizonans of claims for antitrust damages. It did so despite the fact that a prior nationwide settlement, which had been upheld by the Third Circuit, purported to release all of their money damages claims against the defendant. 982 F.2d at 388-89. Because that settlement—like the settlement in this case—did not contain an opt-out right, *Ticor* held that, as a matter of due process, the Arizona plaintiffs were not bound by the judgment and were free to pursue a subsequent lawsuit against the defendants in a forum of their choosing. *Id.* at 392. In so holding, the Ninth Circuit relied on this Court's decision in *Shutts*, 472 U.S. at 812-14, which held that, in order for a class action judgment to have binding effect, absent class members must be given notice and an

opportunity to opt out, at least in class actions "wholly or predominately for money judgments." *Id.* at 811 n.3; *see also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.) (under *Shutts*, plaintiffs not precluded from bringing state court damages suit, despite earlier class action settlement purporting to extinguish their rights, because settlement did not afford class members right to opt out) (involving same underlying antitrust claims presented in *Ticor*), *cert. denied*, 493 U.S. 821 (1989).

This Court granted review in *Ticor* to determine whether the Ninth Circuit was correct in holding that the right to opt out obtains, as a matter of due process, in every class action in which substantial money damages are sought. Although, for the reasons explained above, this Court later dismissed the writ as improvidently granted, if the Court resolves the Rule 23 question against petitioners, this case squarely presents the constitutional question on which review was granted in *Ticor*. *See Ticor*, 114 S. Ct. at 1362-64 (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., join, dissenting).

The Eighth Circuit avoided addressing whether *Shutts* applies to all cases in which substantial monetary damages are sought by relying on its prior decision in *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), holding that petitioners had "consented" to the personal jurisdiction of the district court because they "appeared" there, not only to challenge the lack of opt-out rights, but to object to the fairness of the settlement. *See* Pet. App. 9a-11a. The Eighth Circuit's reasoning misses the mark for at least four reasons.

First, its analysis is at odds with the structure of the Federal Rules, which permits a party to challenge personal jurisdiction under Rule 12(b)(2) at the outset of the case and also to participate fully in all aspects of the merits of the litigation if the challenge to personal jurisdiction is rebuffed, without waiving the personal jurisdiction challenge. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351, at 261 (2d ed. 1990) ("A party who has unsuccessfully raised an objection [to personal jurisdiction] under Rule 12(b)(2) may proceed to trial on the merits without waiving the challenge"). Similarly here, petitioners sought the right to opt out in order to pursue their Virginia litigation, but alternatively challenged the settlement on its merits. In short, the court of appeals' rejection of petitioners' constitutional right to opt out is predicated on the need for a "special appearance" to challenge jurisdiction, which has been abolished under the Federal Rules. *See id.* § 1362, at 450-51.[6]

Second, the court of appeals' ruling encourages collateral attacks and multiple litigation. As illustrated by practice under Rule 12(b)(2), the Eighth Circuit's rule would create a Hobson's choice for absent class members in petitioners' position between asserting *only* their rights to opt out by collateral attack, *or* challenging *only* the merits of the settlement in the initial court, often a distant forum.

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[6] *But cf. In re Real Estate*, 869 F.2d at 769 (indicating in dicta that if absent class members had litigated merits of settlement, rather than merely attempting to extricate themselves from court's jurisdiction through an opt-out motion, they could not collaterally attack settlement in separate proceeding).

Third, petitioners' "appearance" in the district court in Minnesota can hardly be construed as consent to the suit. Because of the inconvenience of the Minnesota forum, they filed written objections in which they claimed that they had a right to opt out—a right which would have preserved their ability to maintain their suit against respondent in their home state of Virginia, but which the settlement agreement specifically purported to abrogate. JA 25-48. Petitioners also objected to the fairness of the settlement on various grounds, not wanting to be deemed to have waived any such objections if their opt-out rights were denied.

Finally, the Eighth Circuit's decision is at odds with this Court's ruling in *Shutts*. To be sure, the initial discussion in *Shutts* of the due process rights of absent class members is cast in "personal jurisdiction" terms. Thus, the Court held that "minimum contacts" of the type necessary to bind defendants are not necessary to bind absent plaintiffs. *Shutts*, 472 U.S. at 808-10. Thereafter, however, in constructing the appropriate standards for binding absent class members in money damages cases, the Court held that, "at a minimum," *all* absent class members must be given notice and an opportunity to opt out. *Id.* at 812. The Court stated that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. . . [,]" but then set forth the minimum due process protections that must be afforded to "absent plaintiff[s] concerning a claim for money damages or similar relief at law. . . ." *Id.* at 811-12 (footnote omitted).

The teaching of *Shutts*, if not its actual holding, is that, while minimum contacts are not necessary to bind absent

class members, minimal due process—notice, adequate representation, and an opportunity to opt out—must be accorded *all* absent class members, not just those lacking jurisdictional contacts, before it can be said that the absent class members have "consented" to be bound. Put differently, the "personal jurisdiction" strain of this Court's due process jurisprudence was relevant only to *Shutts*' decision concerning the potential geographical reach of a class action over absent class members (which the Court held to be nationwide). However, class members' property interest in their causes of action arises from another, related strain of this Court's due process jurisprudence, exemplified by cases such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950) (cited in *Shutts*, 472 U.S. at 812), and *Mathews v. Eldridge*, 424 U.S. 319, 341-49 (1976). Under that aspect of due process, which undergirds the minimum due process guarantees set forth in *Shutts*, the existence of an opt-out right does not turn on whether the absent class members live in the forum state or a neighboring state or whether, as in petitioners' case, absent class members have asserted their opt-out rights and other objections in a written filing sent to the Clerk's Office.

Thus, the most reasonable reading of *Shutts* is that, because of the settlement's abrogation of opt-out rights here, neither petitioners nor any other of the absent class members consented to the jurisdiction of the district court or could otherwise be bound by its order.[7] Accordingly, not only

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[7] In this regard, the language of this Court's holding in *Shutts* describes the minimum due process protections for all absent class members and gives no indication that absent class members who had minimum contacts with Kansas (the forum state) could have

(continued...)

does this case present an opportunity to resolve the question before this Court in *Ticor*, but it will also clarify the precise contours of the due process rights enunciated in *Shutts*.

* * *

The pending petition in *Martin v. Drummond Company, Inc.*, 663 So.2d 937 (Ala. 1995), *petition for cert. filed*, 64 U.S.L.W. 378 (U.S. Oct. 3, 1995) (No. 95-548), a case arising from state court, presents the question whether the *Shutts* opt-out right applies to absent class members who have minimum contacts with the forum state. Plenary review should be granted here in lieu of, or in addition to, *Martin*, because this case presents the predicate question whether Rule 23 required that petitioners be afforded the right to opt out, which was of paramount concern to this Court in *Ticor*.

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[7](...continued)
been denied notice and an opportunity to opt out. *Shutts*, 472 U.S. at 812 (citations omitted).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2800

GRETCHEN DEBOER, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff/Appellee,

v.

MELLON MORTGAGE COMPANY, A TEXAS CORPORATION,

Defendant/Appellee.

MICHAEL THOMAS CREHAN; SUZANNE TETREAULT CREHAN,

Movants/Appellants.

Appeal from the United States District Court for the District of Minnesota.

Submitted: May 15, 1995

Filed: August 30, 1995

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BOGUE,* Senior District Judge.

WOLLMAN, Circuit Judge.

*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

Objectors Michael T. and Suzanne T. Crehan appeal the district court's[1] orders certifying a class and approving a settlement in Gretchen DeBoer's class action suit against Mellon Mortgage Company. We affirm.

I.

Mellon is one of the nation's largest servicers of mortgage loans. Although Mellon's escrow accounting practices have historically been accepted by the Department of Housing and Urban Development ("HUD"), they have been challenged in a number of suits as requiring too high an account balance. Escrow accounts typically are maintained to enable the servicer to pay taxes, insurance, and other expenses as they come due. When the loan servicer maintains excess cushion in an escrow account, the servicer essentially receives an interest-free loan from the customer on the excess amount. Maintaining some cushion, however, enables the servicer to pay off expenses as they accrue without dipping into corporate funds if the customer is delinquent in paying.

Mortgage servicers can account for escrow balances through either an aggregate or an individual-item analysis.[2] When aggregate accounting is used, the servicer estimates the balance for the whole account for the year, assuming that the borrower will make monthly payments equal to one-twelfth of the total disbursements. The monthly balances are then adjusted to reflect

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[1]The Honorable Diana E. Murphy, then Chief Judge, United States District Court for the District of Minnesota, now United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit.

[2]HUD has recently approved a new rule, effective May 24, 1995, requiring the use of aggregate accounting analysis. 24 C.F.R. § 3500.17. This rule allows a three-year phase-in period for pre-existing accounts. *See* 24 C.F.R. §§ 33500.17(b), (c)(4)(i); 60 Fed. Reg. 8812, 8813 (1995).

a lowest monthly trial balance of zero, and the amount of the cushion is then added. 24 C.F.R. § 3500.17(d). When a servicer employs individual-item analysis for its escrow accounts, separate subaccounts are set up for each escrow item. Typically, these individual-item accounts generate more cushion than an aggregate account because the funds for one subaccount are unavailable to pay another subaccount as it comes due; thus requiring an adequate amount of cushion for each subaccount at all times. Neither the Federal National Mortgage Association ("FNMA") nor the Federal Housing Administration or Veterans Administration ("FHA/VA") mortgage forms disallows the use of individual-item analysis.

DeBoer filed her class action suit against Mellon in Minnesota state court in 1992, alleging a number of state law claims as well as a violation of section 10 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609, which sets a ceiling on the amount of allowable cushion. The suit sought to enjoin Mellon "from requiring any mortgagor to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less." The suit also sought to force Mellon to adjust its escrow accounts to ensure compliance with that standard. In August 1993, the Crehans brought an independent suit against Mellon in the Eastern District of Virginia, asserting a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, as well as numerous state law claims.

Following removal of the class action to the federal district court in September 1992, DeBoer and Mellon began negotiations and eventually came to a proposed settlement. The settlement would allow Mellon to employ individual-item analysis accounting in determining an estimate of escrow amounts necessary to pay items as they come due, with accrual completed in the month prior to disbursement. Mellon is also authorized under the settlement to maintain the maximum cushion allowed by law, regardless of the

terms of a customer's mortgage instrument. The settlement requires Mellon to automatically refund excess escrow funds if they total more than $15, pay a class rebate for past charges, and pay $240,000 of the requested $290,000 in attorneys' fees. All individual suits against Mellon would be dismissed under the settlement, including any suit by the Crehans. Prior to the district court's approval of the settlement, the Crehans' Virginia action was dismissed for failing to state a federal cause of action, and during the pendency of this appeal that decision was affirmed by the Fourth Circuit in an unpublished opinion. *Crehan v. Mellon Mtge. Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

The settlement was submitted to the district court on October 27, 1993. Two days later the district court preliminarily certified the class for the purpose of the settlement and approved the notice of the settlement to be published to class members. On May 13, 1994, the district court held a hearing to consider objections. Five timely objections were filed out of an approximate class of 300,000, including the Crehans', and another six individuals timely noted their desire to be excluded from the class. On June 15, 1994, the settlement and attorneys' fees were approved, and on July 5, 1994, the Crehans were allowed to intervene for purposes of appealing the settlement. The Crehans challenge the substance of the settlement, the propriety of a class action to handle the claims against Mellon, their inability to opt-out of the class to pursue their individual claims, and several other points.

II.

A.

Management of class actions is governed by Rule 23 of the Federal Rules of Civil Procedure. The Crehans claim that the class fails to meet the certification prerequisites of Rule 23(a) because common questions of law or fact do not exist. The Crehans also claim that DeBoer does not present claims that are typical of the class and that DeBoer and class counsel have provided woefully inadequate representation of the class.

Commonality is not required on every question raised in a class action. Rather, Rule 23 is satisfied when the legal question "'linking the class members is substantially related to the resolution of the litigation.'" *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (quoting *American Fin. Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974)), *cert. denied*, 460 U.S. 1083 (1983). The Crehans claim that the differing types of mortgage contracts give rise to different claims that call for different treatment through subclasses. The fact that individuals with different mortgage forms will have RESPA or contract claims of differing strengths does not impact on the commonality of the class as structured, however. *See Forbush v. J.C. Penny Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (commonality and typicality satisfied in challenge to pension calculations despite presence of four different pension plans). The main point of contention centers on Mellon's alleged over-escrowing of funds, and all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some class members have different mortgage contracts. This declaratory and injunctive nexus is sufficient to establish the requisite commonality. *See Paxton*, 688 F.2d at 561. Other class actions have also been maintained on similar bases. *See, e.g., GMAC Mtge. Corp. of Pa. v. Stapleton*, 603 N.E.2d 767 (Ill. App. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993). Nor does the nature of the proposed settlement alter this inquiry. *In re GMAC Fuel Tank Liability*, 55 F.3d 768, 795-96 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3017 (Jun. 28, 1995) (No. 94-2137).

Similarly, Rule 23(a)'s typicality requirement is satisfied. The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff. *Paxton*, 688 F.2d at 562. DeBoer's claims are typical of the remainder of the class given the nature of the injunctive relief sought. *See Forbush*, 994 F.2d at 1106. This typicality is not altered by the different mortgage instruments held by class

members. The relief sought in the action is the same regardless of the amount of overage in any particular account. *See Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.) ("When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment."), *cert. denied*, 434 U.S. 856 (1977); *see also Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (typicality met despite varying fact patterns).

DeBoer and class counsel also appear to have fairly and adequately represented the class. There is no indication that DeBoer's interest was antagonistic to the remainder of the class or that the claims were not vigorously pursued. *See Paxton*, 688 F.2d at 562-63. The fact that the Crehans do not approve of the settlement terms does not, of itself, demonstrate that DeBoer and class counsel provided inadequate representation. To hold as much would require decertification any time an objection is raised to a class, certainly not the standard envisioned by Rule 23. "The adequacy of class representation . . . is ultimately determined by the settlement itself." *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). In sum, the district court did not abuse its discretion in finding Rule 23(a)'s certification prerequisites satisfied. *See Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975).

B.

The district court found the class properly certifiable under either Rule 23(b)(1) or (b)(2). The Crehans assert that certification of any class should have been under section (b)(3) so that the class members could opt-out of the settlement and pursue their claims individually. When either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation. *See Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (discussing (b)(1)); 7A Charles A. Wright et al., Federal Practice and Procedure § 1772, at 425 (1986) (discussing (b)(1)); *id.* § 1775, at 491 (discussing (b)(2)); *id.* § 1777, at 521 (noting that

"the privilege to opt-out of the action should be operable only when the class action is maintainable under [Rule 23(b)(3)] alone").

Certification is appropriate under subsection (b)(2) if class-wide injunctive relief is sought when the defendant "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). In this case, the class sought such injunctive relief against Mellon's alleged over-escrowing practices. Therefore, certification under section (b)(2) was appropriate. *See* 7A Wright, et al., *supra*, § 1775, at 470 ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)."). "The fact that [damages were] sought incidentally to the prayer for injunctive relief does not affect this result." *Paxton*, 688 F.2d at 563. Any potential unfairness to the Crehans in compromising their claims is "outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Because we find the class properly certifiable under section (b)(2) we need not address the applicability of section (b)(1).

Contrary to the Crehans' contentions, we are not presented with any due process problems in the composition of a mandatory class. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985), the Supreme Court left open the question whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. When an objector submits to the court's jurisdiction, however, the *Shutts* dilemma is avoided. *White*, 41 F.3d at 407-08. Nor must we today decide the question whether a suit seeking equity can bind a putative class member, thus preventing a subsequent suit for damages, *compare In re Colt Indus. Shareholders' Litig.*, 566

N.E.2d 1160, 1167 (N.Y. 1991) (finding that due process precludes extinguishing the rights of an absent plaintiff to bring an action in damages in another jurisdiction) *with Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir.) (concluding that due process protections "bind absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert. denied*, 115 S. Ct. 480 (1994), because the Crehans are not absent plaintiffs in this action.

In response to the notice of the proposed settlement, the Crehans noted their objections to being included within the settlement class, but they also took issue with the terms of the settlement. By submitting extensive memoranda to the district court on the issues of the fairness of the settlement, and again reaffirming their position to us on appeal, the Crehans have waived any potential due process requirement that would allow them to pursue their claims again in another forum. *White*, 41 F.3d at 407-08. *Cf. In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir. 1989) (appearance to merely contest inclusion in class insufficient to waive personal jurisdiction complaint), *cert. denied*, 493 U.S. 821 (1989). The release entered into on their behalf[3] is thereby consistent with due process. *See Grimes*, 17 F.3d at 1564 (permissible for the class settlement to preclude later actions relying on different legal theories when those claims arise out of the same operative facts as presented in the settlement); *see also Shutts*, 472 U.S. 808-12 (discussing the inherent due process protections in class action procedures, and the attendant lesser need for external protections of class plaintiffs). Essentially, the Crehans have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their

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[3]The release language is intended to prevent further litigation against Mellon on this matter and specifically mentions the Crehans' earlier-pending Fourth Circuit litigation.

briefs to this court. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.) (jurisdictional objection waived when arguments go "to the heart of the issue before the district court"), *cert. denied*, 498 U.S. 926 (1990).

The Crehans also challenge the sufficiency of the notice of the proposed settlement. Notice of a settlement proposal need only be as directed by the district court, Fed. R. Civ. P. 23(e), and reasonable enough to satisfy due process. *See Grunin v. International House of Pancakes*, 513 F.2d 114, 120-22 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). Each class member was notified by mail and notice was also printed in a national publication. Although neither extensive nor remarkably thorough, we find the notice sufficient to comply with the strictures of due process. *See Reynolds*, 584 F.2d at 285; *see also Maher v. Zapata Corp.*, 714 F.2d 436, 452 (5th Cir. 1983) (notice "is not required to provide a complete source of settlement information"). The class received due notice of the proceeding and settlement proposal, and the Crehans were able to vigorously argue their position in their objections to the district court. "Due Process requires no more." *Reynolds*, 584 F.2d at 285.

Nor did the district court abuse its discretion in limiting the Crehans' intervention to an appeal of the settlement. The timing of the motion, coupled with the court's earlier findings as to the reasonableness of the settlement, serves to validate the court's ruling. *See White v. National Football League*, 822 F. Supp. 1389, 1432 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995).

III.

"In approving a class settlement, the district court must consider whether it is 'fair, reasonable, and adequate.'" *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) (quoting *Grunin*, 513 F.2d at 123). The district court's assessment as to the reasonableness of a settlement "will not be overturned unless the party challenging the settlement clearly shows that the district court

abused its discretion." *Id.* at 607; *see Wiener v. Roth*, 791 F.2d 661, 662 (8th Cir. 1986) (per curiam). The district court noted the Crehans' objections, but issued cursory findings as to the fairness of the settlement. Although the district court's lack of more extensive findings is somewhat troubling, the Crehans do not strenuously complain about this fact because they assert that on its face the settlement is so lacking in value to the class that reversal is mandated. In the absence of specific findings regarding the fairness of the settlement, we must assume that the district court did not abuse its discretion unless the record establishes the contrary. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437 (1968) (remand not necessary where "the record contain[s] adequate facts to support the decision of the trial court to approve the proposed compromises"). *Accord In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1136 (1984), *cert. denied*, 469 U.S. 1207 (1985). In such cases we should reverse the district court only if there is no basis upon which it could have found that the settlement is a reasonable one or if the settlement is improper as a matter of law.

Counseling strongly in favor of the settlement is the fact that the plaintiffs did not have a very strong case — they may not have even had a legitimate federal cause of action. The Circuits are split on the issue of whether section 10 of RESPA creates a private right of action. *See State of Louisiana v. Litton Mtge. Co.*, 50 F.3d 1298, 1301-02 (5th Cir. 1995) (no cause of action); *Allison v. Liberty Savings*, 695 F.2d 1086 (7th Cir. 1982) (same). *But see Vega v. First Fed. Savings & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir. 1980). We need not decide whether such an action lies for purposes of this appeal, but we do note that the district court in this instance dismissed a case for precisely this reason during this same time frame, *Michels v. Resolution Trust Corp.*, Civ. No. 4-93-1167 (D. Minn. April 13, 1994), and that a number of other district courts have also found no viable cause of action. *See Litton Mtge.*, 50 F.3d at 1301-02 n.14 (citing cases).

In light of this fact, there was a strong unlikelihood of success, or, at best, a certainty of initial defeat followed by another round at the appellate level. Accordingly, virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation.

The Crehans claim that because the Sixth Circuit in *Vega* is the only Circuit to have found a private cause of action under Section 10, class counsel was per se inadequate for failing to bring the case in that Circuit. We decline to accept the invitation to hold that forum shopping in an unsettled area of the law is an essential element of adequate representation. The summary affirmance of the dismissal of the Crehan's individual claims in the Fourth Circuit is an indication of the faint chance of success that existed with respect to the RICO and damage claims that the Crehans wish had been asserted. The other claims relating to individual-item analysis accounting faced a similarly difficult road given HUD's past acceptance of Mellon's escrow accounting practices. *See Stapleton*, 603 N.E.2d at 774. The problems relating to the merits of the plaintiffs' claims strongly favor the settlement. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (adequacy of settlement must be measured against "the strength of the case presented by the plaintiffs").

The Crehans claim that the class suit was based primarily on the desire to recover money damages and that the injunctive relief was unnecessary because the automatic refunding procedure to which Mellon agreed was already in place. Thus, according to the Crehans, the settlement is basically a sham that gives class counsel an undeserved windfall and the class plaintiffs nothing but a paltry sum in damages. Mellon and class counsel counter that the mandatory automatic refund procedure provides the major benefit to the class and will result in consumer savings in the millions of dollars. Mandatory automatic refunding is consistent with the injunctive relief sought in the initial complaint and settlement negotiations. The practice of automatically refunding escrow

overages has historically been inconsistently followed by Mellon;[4] thus, requiring Mellon to hew to this procedure should provide some benefit to the class.

The Crehans claim further that the automatic refund provision is offset by the fact that Mellon can now hold higher balances in escrow; they also assert that prior to the settlement no account reserve was allowed for FNMA customers, whereas under the settlement Mellon may retain reserves. Interpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe, *see Stapleton*, 603 N.E.2d at 774; *Attorney General v. Michigan Nat'l Bank*, 325 N.W.2d 777 (Mich. 1982), and the FNMA form does not require the automatic refunding that is now available to the class. Further, it is the time value of the refund we must consider against the time value of any potential additional escrow balance, not the dollar amount held in the account in absolute terms. The settlement does not allow Mellon to increase anyone's loan obligation.

"'The very purpose of compromise is to avoid the delay and expense of . . . a trial.'" *Grunin*, 513 F.2d at 124 (quoting *Young v. Katz*, 447 F.2d 431, 433 (3d Cir. 1971)). Accordingly, while it is incumbent on the district court to determine the propriety of the settlement, it need not resolve all of the underlying disputes, *see id.* at 123, and the value of the settlement need not be determined with absolute precision. Additionally, the potential drain on the resources of both parties in discovery relating to Mellon's escrow records to verify its treatment of all its accounts provides an incentive to settlement. The parties to a class action are not required to incur immense expense before settling as a means to justify that settlement.

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[4]Mellon had engaged in such automatic refunding prior to 1990. This practice was eliminated from 1990 until 1992 and was re-initiated following the filing of this suit.

The views of the parties to the settlement must also be considered. As noted by the district court, class counsel is experienced in this type of litigation. *See Armstrong v. Board of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980) (noting that the views of counsel are to be accorded deference). The fact that only a handful of class members objected to the settlement similarly weighs in its favor. *See Reynolds*, 584 F.2d at 287; *see also Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23-24 (2d Cir. 1987) (district court has a duty to the silent majority as well as the vocal minority). Having adduced no evidence of collusion other than their complaints as to the settlement terms, the Crehans have failed to raise an inference of bad faith in the negotiation process. It also warrants mention that a Magistrate Judge[5] presided over the settlement negotiations and that the district court had prior experience with this type of litigation. Such multiple layers of scrutiny further militate in favor of the settlement and against the Crehans' claims of collusion.

The award of attorneys' fees likewise does not constitute an abuse of discretion. The vast majority of the fee will be paid by Mellon and will not come out of any class recovery. The continuing nature of a permanent refunding procedure constitutes a benefit to the class adequate to justify the fee award.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5]The Honorable Jonathan Lebedoff, United States Magistrate Judge for the District of Minnesota.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

GRETCHEN DEBOER,
AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

Court File No. 4-92-CV-8222

FINDINGS AND ORDER

vs.

MELLON MORTGAGE
COMPANY

Defendant.

This matter came on for hearing before the undersigned on Friday, May 13, 1994 on the motion of Plaintiffs for final approval of the class action settlement-entered into between the parties to the action. Defendant appeared in support of said motion.

The Plaintiff class was represented by Charles S. Zimmerman and Barry G. Reed of the law firm Zimmerman Reed. Defendant was represented by Michael J. Bleck and Mary E. Senkus of the law firm of Oppenheimer Wolff & Donnelly, 3400 Plaza VII, 45 South Seventh Street, Minneapolis, Minnesota 55402. The issues with respect to the fairness of the proposed settlement and the attorneys' fees and costs sought by Plaintiffs' counsel were briefed and argued. Based upon such briefs and arguments, and upon the other files and records in this matter, the Court finds and orders as follows:

1. This action was commenced against Defendant in the District Court, County of Hennepin, State of Minnesota on August 3, 1992.

2. The claims asserted by Plaintiffs consist of one cause of action under Section 10 of the Real Estate Settlement Procedures Acct ("RESPA"), and three causes of action asserting remedies under state common law.

3. The matter was subsequently removed to this Court on the petition of Defendant.

4. This action may for all purposes be maintained as a class action with the class consisting of all persons who have or had escrowed mortgage loans that were serviced or subserviced by Defendant at any time from January 1, 1990 up to and including June 30, 1993 (the "Class Period"). This class includes subclasses of (a) all persons who have escrowed mortgage loans that are being serviced or subserviced by Defendant as of June 30, 1993, and (b) all persons who formerly had escrowed mortgage loans that were serviced or subserviced by Defendant or its predecessors during the Class Period which loans were paid off, transferred or otherwise removed from Defendant's books and records, or whose escrow accounts were waived by Defendant during the Class Period.

5. The Plaintiffs as class representatives, fairly and adequately represent the interests of the class.

6. The notice previously given to class members in this action satisfies the requirements of due process and the requirements of Rule 23 Federal Rules of Civil Procedures.

7. The Settlement Agreement is fair, reasonable and adequate as to each member of the class. The court notes in this regard that only five objections were received from a class of approximately 300,000.[1]

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[1] The court also received responses from six individuals who wished to be excluded from the class. In addition, an objection and an "Option Out of Case" were filed several months after the March 8, 1994 deadline for objections. The court has reviewed the late submissions and even if they had been timely, they would not alter the court's conclusion that the

The most detailed objection was filed by Michael and Susan Crehan, who objected to the language in the settlement waiving claims they have pursued through individual litigation. The Crehan's case was dismissed on October 15, 1993 before the settlement in this case; no appeal was pending when the settlement was reached.

The court must view the settlement as a whole. *White v. National Football League*, 822 F. Supp. 1389, 1426 (D.Minn. 1993). A settlement should not be struck down on the basis of one or two provisions if, as a whole, it is fair and reasonable. *Id.* Based on the entire record, the strength of the plaintiffs' case, the benefits conferred by the settlement, the complexity of the case, and the opinions of counsel, the court finds the settlement as a whole to be fair and reasonable to the class.

8. Each member of the class is bound by the terms of the Settlement Agreement, including those regarding the ongoing servicing of their mortgage escrow accounts, and the release and covenant not to sue provided for in the Settlement Agreement between the parties. The mortgage contract of each member of the class is amended, as provided for in the-Settlement Agreement, to expressly include the provisions for ongoing servicing of the mortgage escrow impound account in the manner provided for in the Settlement Agreement.

9. Beginning on the effective date of the settlement as defined in the Settlement Agreement, or earlier at the election of Defendant, Defendant shall institute, or to the extent it has already been instituted, continue to use, the methodology for servicing the escrow accounts the class members set forth in the Settlement Agreement.

10. On the date provided in the Settlement Agreement, Defendants shall pay a total of $290,000 to Zimmerman Reed as

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settlement as a whole is fair and reasonable.

and for attorneys' fees, costs and expenses comprising of $240,000 from Defendant and $50,000 from the interest fund payable to the Class. All remaining sums to be paid under the terms of the Settlement Agreement shall then be credited or paid to members of the Class, as provided for in the Settlement Agreement.

11. All claims in the litigation against Defendant herein are dismissed on the merits and with prejudice. Each member of the class is permanently enjoined from bringing against Defendant or any of its shareholders, directors, officers, or employees any claim regarding the matters involved in this litigation. Any party violating the Court's injunction shall be required to pay the costs and attorneys' fees incurred by any released party as a result of a violation of the Court's injunction.

12. The Court hereby retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement Agreement between the parties.

Date: 6/14/94

Diana E. Murphy
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

GRETCHEN DEBOER,
AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

vs.

MELLON MORTGAGE
COMPANY

Defendant.

Court File No. 4-92-CV-822

ORDER REGARDING
ATTORNEYS' FEES AND
COSTS

This matter came on for hearing before the undersigned on May 13, 1994, on the motion of Plaintiffs for approval of the Petition of the law firm of Zimmerman Reed seeking attorneys fees and reimbursement of costs and expenses in the amount of $290,000. Defendants do not oppose said motion.

The Plaintiff class was represented by Charles S. Zimmerman and Barry G. Reed of the law firm of Zimmerman Reed, 5200 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402. Defendant was represented by Michael J. Bleck and Mary E. Senkus of the law firm of Oppenheimer Wolf & Donnelly, 3400 Plaza VII, 45 South Seventh Street, Minneapolis, MN 55402. Based upon the Petition of Zimmerman Reed, the arguments regarding the fairness of the settlement, and the files and records herein the Court finds and orders as follows:

1. The Plaintiff class in this action has been represented by the law firm of Zimmerman Reed. The firm of Zimmerman Reed is know by the court to be experienced and knowledgeable in the area of class action litigation, and has displayed to the Court a

thorough knowledge of the areas of dispute between the class and the Defendant regarding the mortgage escrow practices of Defendant, and the mortgage servicing industry generally, and which knowledge and experience has contributed to a settlement beneficial to the class.

2. The Court has reviewed the Petition for Attorneys' Fees and Expenses submitted by Zimmerman Reed and has determined that the amounts petitioned for are reasonable, and therefore, directs that counsel for the class shall receive the total sum of $290,000 as and for compensation for their legal services and to reimburse them for reasonable out-of-pocket costs and expenses, comprising of $240,000 from Defendant and $50,000 from the interest fund payable to the Class. Said sums to be paid directly to Zimmerman Reed by Defendant as provided for in the Settlement Agreement.

Dated: 6/14/94 Honorable Diana E. Murphy

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

GRETCHEN DEBOER, ETC.,

Appellee,

vs.

MELLON MORTGAGE COMPANY, ETC.,

Appellee.

MICHAEL THOMAS CREHAN, ET AL.,
Appellants.

Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing has been considered by the Court and is denied.

October 25, 1995

Order Entered at the Direction of Court:
Michael E. Gais
Clerk, U.S. Court of Appeals, Eight Circuit

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgement, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgement in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgement in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders In Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgement, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

No. 95-1322

In The

Supreme Court of the United States

October Term, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*,
and MELLON MORTGAGE COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT MELLON MORTGAGE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BLECK
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March 22, 1996

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22 pp

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals decision, applying Rule 23(b)(2) to a class action seeking primarily injunctive and equitable relief and concluding that petitioners waived any due process objection by intervening, was correct.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.1, Respondent Mellon Mortgage Company states that it has no subsidiaries except those which are wholly-owned. Respondent's parent company is Mellon Bank, N.A. Mellon Bank, N.A., is a wholly-owned subsidiary of Mellon Bank Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent Mellon Mortgage Company respectfully requests that this Court deny the petition of Michael and Suzanne Crehan for writ of certiorari which seeks review of the opinion issued below in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 64 F.3d 1171 (8th Cir. 1995), included in the appendix at Pet. App. 1a, and the decision of the United States District Court for the District of Minnesota is contained in the appendix at Pet. App. 14a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is included in the appendix at Pet. App. 21a.

STATEMENT OF THE CASE

This is one of many class actions commenced against mortgage lenders alleging that they are overcharging homeowners for tax and insurance escrows. The complaint sought primarily declaratory and injunctive relief in regard to Mellon's escrow practices, including a declaration that its practices are improper, an injunction permanently enjoining Mellon from maintaining escrow accounts with an excessive "cushion," and an order directing Mellon to recalculate each escrow account to ensure that the balance in each account is not excessive. Contrary to these claims, Mellon's escrow practices have historically been accepted by the Department of Housing and Urban Development.

Despite the clear record of injunctive and equitable relief sought, the petition factually misconstrues the case as one primarily pursuing money damages and therefore mistakenly attempts to overturn the district court's proper certification of a mandatory non-opt-out class in connection with a settlement under Federal Rule of Civil Procedure 23(b)(2). In light of petitioners' erroneous premise, combined with their waiver of any constitutional objection, no new questions are presented here: either impacting Rule 23 or due process.

Escrow Practices

Escrow accounts are maintained to allow the servicer to pay taxes, insurance, and other expenses as they become due. Maintaining some cushion enables the servicer to pay off expenses on behalf of the customer as

they accrue without dipping into the servicer's funds if the customer is delinquent in paying.

Mortgage servicers have accounted for escrow balances through either an aggregate or an individual analysis. When aggregate accounting is used, the servicer estimates the balance for the whole account for the year, assuming that the borrower will make monthly payments equal to one-twelfth of the total disbursements. The monthly balances are then adjusted to reflect a lowest monthly trial balance of zero, and the amount of the cushion is then added. 24 C.F.R. § 3500.17(d). When a servicer employs individual-item analysis for its escrow accounts, separate subaccounts are set up for each escrow item. Neither the Federal National Mortgage Association nor the Federal Housing Administration or Veterans Administration mortgage forms has disallowed the use of individual-item analysis. HUD, however, approved a new rule effective May 24, 1995 requiring the use of aggregate accounting analysis. 24 C.F.R. § 3500.17. This rule allows a three-year phase-in period for existing accounts. 24 C.F.R. § 3500.17(b),(c)(4)(i); 60 Fed. Reg. 8812, 8813 (1995).

Procedural History

DeBoer filed her class action against Mellon in Minnesota state court in 1992, alleging a violation of section 10 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609, which sets a ceiling on the amount of allowable cushion, and a number of state law claims. The case sought to enjoin Mellon "from requiring any mortgagor to establish or maintain in an escrow

account an actual cushion in excess of the cushion authorized by the underlying contract or the RESPA ceiling, whichever is less." The suit also sought equitable relief to force Mellon to adjust its escrow accounts to ensure compliance with that standard. In 1993 petitioners, who are both sophisticated attorneys with a $300,000 mortgage, brought a suit against Mellon in the Eastern District of Virginia asserting a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, as well as numerous state law claims.

Following removal of the class action to the federal district court, DeBoer and Mellon negotiated under the supervision of a Magistrate Judge and agreed upon a proposed settlement. The settlement allows Mellon to employ individual-item analysis accounting in determining an estimate of escrow amounts needed to pay items as they come due, with accrual completed in the month prior to disbursement. Mellon is also allowed under the settlement to maintain the maximum cushion allowed by law, regardless of the terms of a customer's mortgage instrument. The settlement requires Mellon to automatically refund excess escrow funds if they total more than $15, pay a class rebate for past charges, and pay $240,000 of the requested $290,000 in attorney's fees. The mandatory refund procedure provides a major benefit to the class and will result in savings in millions of dollars.

All individual suits would be dismissed under the settlement, including any suit by petitioners. The settlement also contained a release intended to prevent any further litigation against Mellon on this matter and specifically mentions petitioners' earlier-pending Fourth Circuit litigation. Prior to the district court's approval of the

settlement, petitioners' Virginia action was dismissed for failing to state a federal cause of action, and during the pendency of this appeal that decision was affirmed by the Fourth Circuit. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

In October 1993, the district court preliminarily certified the class for purposes of the settlement and approved the notice of the settlement to be mailed to class members and printed in a national publication. On March 8, 1994 petitioners submitted a 24-page brief together with attached exhibits containing objections to the merits of the settlement, the certification of the class, the adequacy of class representation, the class notice, and their inability to opt-out. On April 12, 1994 petitioners moved to intervene. In May 1994, the district court held a hearing to consider objections. Only five timely objections were filed out of an approximate class of 300,000, including petitioners, and another six individuals timely noted their desire to be excluded from the class. In June 1994, the settlement and attorneys' fees were approved and on July 5, 1994 the court granted petitioners' motion to intervene, allowing them to appeal the settlement.

Petitioners then appealed to the Eighth Circuit Court of Appeals, challenging the substance of the settlement, the propriety of the class action to handle the claims against Mellon, the adequacy of class representation, their inability to opt-out of the class to pursue their individual claims and several other points. The court of appeals upheld the district court's decision that the settlement is reasonable, noting among other things that the plaintiffs did not have a very strong case – they may not have even had a legitimate federal cause of action.

Although not needing to reach the issue in this case, the court of appeals recognized that the Circuits are split on whether section 10 of RESPA creates a private right of action. *See State of Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301-02 (5th Cir. 1995) (no cause of action); *Allison v. Liberty Savings*, 695 F.2d 1086 (7th Cir. 1982) (same). *But see Vega v. First Fed. Savings & Loan Ass'n of Detroit*, 622 F.2d 918, 925 (6th Cir. 1980). In light of this, the court of appeals concluded there was a strong unlikelihood of success and any benefit to the class was better than the prospect of ultimately unsuccessful litigation. Further, as noted in the Eighth Circuit's opinion, the summary affirmance of the dismissal of petitioners' individual claims in the Fourth Circuit reflected the faint chance of success that existed with respect to the RICO and damage claims that petitioners wish had been asserted in this case. According to the court of appeals, the other claims relating to individual-item analysis faced a similarly difficult road given HUD's past acceptance of Mellon's escrow accounting practices. *See GMAC Mortgage Corp. v. Stapleton*, 603 N.E.2d 767 (Ill. Ct. App. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993).

In affirming the district court's approval of the reasonableness of the settlement, the court of appeals held from a procedural standpoint that the class was properly certified under Rule 23(b)(2) with no opt-out because class-wide injunctive relief was brought asserting that Mellon "has acted or refused to act on grounds generally applicable to the class." The court of appeals also decided that petitioners had waived any potential due process requirement that would allow them to pursue their claims in another forum by submitting extensive memoranda to

the district court on the issues of the fairness of the settlement and again by reaffirming their position on appeal.

REASONS FOR DENYING THE WRIT

In light of the injunctive and equitable relief sought, this case was properly certified as a class without opt-out according to Rule 23(b)(2). The decision by the Eighth Circuit Court of Appeals was based upon a correct application of Rule 23 to the facts before it, consistent with other courts of appeal, and does not present any new questions regarding Rule 23. Nor does this Court need to reach any potential due process issues because petitioners waived any potential due process objection when they appeared and intervened before the district court and court of appeals.

I. In Light Of The Injunctive Relief Sought, The Class Was Properly Certified Under Rule 23(b)(2) Without Opt-out.

Although petitioners assert that class certification should have been under Rule 23(b)(3) so that they could opt-out of the settlement and pursue their claims individually, the district court and court of appeals properly found the class certifiable under section (b)(2). The district court also certified the class, in the alternative, under section (b)(1) but the court of appeals did not need to address the section (b)(1) certification.

It is well established that when either section (b)(1) or (b)(2) is applicable, section (b)(3) should not be used,

so as to avoid unnecessary inconsistencies and compromises in future litigation. *See Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (discussing (b)(1)); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1775, at 491 (1986) (discussing (b)(1)); *id.* § 1777, at 521 (noting that "the privilege to opt-out of the action should be operable only when the class is maintainable under [Rule 23(b)(3)] alone"). If the court determines that both sections (b)(2) and (b)(3) apply, then it should treat the suit as having been under section (b)(2) so that all the class members will be bound. *Id.*

In this case, the class sought injunctive and equitable relief against Mellon's alleged over-escrowing practices. Certification under section (b)(2) is appropriate if class-wide injunctive relief is sought when the defendant "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). Certification under section (b)(2), therefore, was appropriate. *See* Wright, Miller & Kane, *supra*, § 1775, at 470 ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).").

Petitioners' entire argument under Rule 23 is built on the erroneous premise that money damages are "the predominant claim for relief" in this case. The record is clear, however, that the class claims here primarily involved claims of injunctive relief and "[t]he fact that [damages] were sought incidentally to the prayer for relief does not affect this result." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1993). Rather than the injunctive relief in the settlement being a sham as baldly suggested in the petition, the court of

appeals decided that "[i]nterpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe" and "the permanent refunding procedure [contained in the settlement agreement] constitutes a benefit to the class." Pet. App. 12a-13a. Moreover, the primary nature of the injunctive relief sought against the class as a whole in this case is not altered by the district court's proper certification of a class of both current and former Mellon customers, a ruling unchallenged here. *See* Wright, Miller & Kane, *supra*, § 1775, at 463-67 (courts allow rule 23(b)(2) actions involving damages when the primary relief sought is an injunction).

As recognized in numerous other cases, any potential unfairness to petitioners in compromising their claims is "outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975).

A class action is properly certified under Rule 23 (b)(2) in circumstances like this case which involve issues of institutional policy, practice, process and procedure that are generally applicable to all class members. *Gorton v. Johnson*, 100 F.R.D. 801, 803 (E.D. Mich. 1984). Mellon's alleged over-charging for escrow accounts is conduct "generally applicable to the class." In addition, the 24-page settlement agreement sets forth in great detail the standard of conduct Mellon must follow with respect to its escrow criteria and methodology. Mellon's standard of conduct and future escrow practices are mandated by the settlement agreement. To allow opt-outs would expose

Mellon to inconsistencies in future litigation, one of the primary policy reasons behind section (b)(2). *See* 7A Wright, Miller & Kane, *supra*, § 1775, at 491.

Challenges to various policies and practices have been certified under section (b)(2) even though some monetary relief was also sought and obtained. *See Calkins v. Blum*, 511 F. Supp. 1073 (N.D. N.Y. 1981), *aff'd on other grounds*, 675 F.2d 44 (2d Cir. 1982) (class challenging methodology of computing income of medicaid applicants); *Gould v. Sullivan*, 131 F.R.D. 108, 115 (S.D. Ohio 1989) (challenge to under payment of SSI benefits); *Martinez v. Dunlop*, 411 F. Supp. 5 (N.D. Cal. 1976), *aff'd*, 573 F.2d 555 (9th Cir. 1977) (challenge to calculation of employment payments).

Contrary to the petition, the decision here is not inconsistent with the rulings of other courts of appeals. In *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983), the Eleventh Circuit merely recognized that in Title VII employment discrimination cases back pay claims are in some circumstances considered more similar to damages in a (b)(3) class action and thus entitled to opt-out protection. *See also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975). Unlike this case, these holdings arose from discrimination claims involving primarily money damages as compared to injunctive relief.

Determining the certification of a class action is necessarily within the discretion of the district court and

should only be overturned upon a showing of an abuse of that discretion. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). Its decision here was consistent with other courts of appeals and the petition does not present any new questions regarding Rule 23.

II. Petitioners Waived Any Potential Due Process Objection When They Appeared and Intervened Before The District Court And The Court Of Appeals.

Contrary to the petition, this Court is not presented with any constitutional due process problems in the composition of a mandatory class. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985), the Court left open the question whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. As the court of appeals recognized, however, the *Shutts* issue is avoided when an objector submits to the court's jurisdiction. *White v. National Football League*, 41 F.2d 402, 407-08 (8th Cir.), *cert. denied*, 115 S. Ct. 2569 (1995). The Court need not decide here whether in a suit seeking equitable relief due process precludes binding an absent class member's subsequent suit for damages because petitioners are not absent plaintiffs in this action. Rather, they were subject to the jurisdiction of the district court.

By intervening and submitting extensive memoranda to the district court on the issues of the fairness of the settlement and again reaffirming their position on appeal, petitioners have waived any potential due process requirement that would allow them to pursue their claims in another forum. *See White*, 41 F.2d at 407-08; *Martin v.*

Drummond Company, Inc., 663 So. 2d 937, 945 (Ala. 1995), *cert. denied*, 64 U.S.L.W. 3588 (1996) (shareholders submitted to the jurisdiction of the court by availing themselves of its statutory appraisal procedure, "thus invoking the benefits and protections of its laws," *quoting from Hanson v. Dencla*, 357 U.S. 235, 253 (1958)).

The district court in this case had the requisite power to exercise personal jurisdiction over petitioners and bind them as long as they had minimum contacts with the forum and they were not otherwise denied due process. *See International Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1945). This personal jurisdiction requirement is not an Article III restriction on the federal courts, but rather an individual liberty interest flowing from the Due Process Clause. *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Like other such rights, the personal jurisdiction requirement can be waived. *Id.* at 703.

Thus, the district court here need only have provided "notice plus an opportunity to be heard and participate in the litigation" in order to satisfy due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). As recognized in *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n.8 (3rd Cir.), *cert. denied*, 115 S. Ct. 480 (1994), due process protections are sufficient to "bind absent class members who had sufficient minimum contacts with the forum." The teaching of *Shutts* and this Court's other due process jurisprudence is that litigants are bound if they have had minimum contacts with the forum sufficient to create personal jurisdiction.

The district court provided for notice to each class member, including petitioners, containing a full disclosure of the proposed settlement and its ramifications. The notice also informed all class members that a hearing to determine the fairness and reasonableness of the settlement would be scheduled before the district court. The class members were invited to appear at the hearing to present any arguments that may be relevant and proper concerning the settlement. Petitioners did precisely that by intervening and submitting lengthy written memoranda to the district court and later the court of appeals challenging the substance and fairness of the settlement, the propriety of class certification, the adequacy of class representation, the content of the class notice, their inability to opt-out, the amount of attorneys' fees and several other points.

The petition in effect concedes the jurisdictional significance of petitioners' appearance before the district court and court of appeals – by admitting they made a tactical decision to challenge the merits of the settlement in order to avoid a waiver if their opt-out request was denied. Pet. 20. Although the petition characterizes this as a "Hobson's choice" and asks the Court to create a "special appearance" for plaintiffs to assert claims like an affirmative defense under Rule 12(b)(2), *Shutts* makes clear that a class-action plaintiff is in a quite different posture than a defendant. *Shutts*, 472 U.S. at 808-09. As this Court noted in *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), a class suit is an exception to the general rule that one cannot be bound by a judgment in personam unless one was made a party in the traditional sense. Rather, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those

interested in the litigation was too great to permit joinder. Even absent parties are bound by the judgment so long as the named parties adequately represented the absent class and pursuit of the litigation is within the common interest. *Id.* This result is even more appropriate in this case where petitioners submitted to the jurisdiction of the district court.

Given that the district court had sufficient jurisdiction to bind petitioners, the release entered into on their behalf is thereby consistent with due process. *See Grimes*, 17 F.3d at 1564 (permissible for the class settlement to preclude later actions relying on different legal theories when those claims arise out of the same operative facts as presented in the settlement).

Despite the attempt in the petition to argue otherwise, this is not a circumstance where an absent class member who does not have minimum contacts with the forum would be enjoined from relitigation in another forum of claims wholly or predominately for money damages. *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994); *Shutts*, 472 U.S., at 808-12; *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3rd Cir.), *cert. denied*, 493 U.S. 821 (1989). Unlike *Ticor*, *Shutts* and *Real Estate Title*, petitioners have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their briefs to the district court and court of appeals. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990) (jurisdictional objection waived when arguments go "to the heart of the issue before the district

court"). In addition to petitioners' waiver of any constitutional due process objection by appearing and intervening in this case, those decisions presented a wholly different issue: whether due process requires opt-out rights in every class action where primarily money damages as opposed to injunctive relief are sought.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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No. 95-1322

In the
Supreme Court of the United States
October Term, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, et al.,
and MELLON MORTGAGE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a nationwide class action settlement which secures predominantly injunctive and declaratory relief, and monetary relief only incidental to that, does certification of a non-opt out class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(1) comply with due process when procedures are made available to class members to receive notice, object and be fully heard, and non-absent class members submit to the jurisdiction of the District Court and participate extensively in the settlement process by entering an appearance, moving to intervene pursuant to Fed.R.Civ.P. 24, and filing extensive legal memoranda with exhibits objecting to merits of the settlement, adequacy of representation and their inclusion in the terms of the settlement ?

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No. 95-1322

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, et al.,
and MELLON MORTGAGE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Respondents Gretchen DeBoer and all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Eighth Circuit's opinion below. That opinion is reported at 64 F.3d 1171 (8th Cir. 1995) and is reprinted in the petition for certiorari at Appendix A1.

STATUTES INVOLVED

Federal Rule of Civil Procedure 23(b) provides in part:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class would as a practical matter be dispositive if the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

STATEMENT OF THE CASE

1. DeBoer's Minnesota Action.

This case was commenced as a nationwide class action challenging Respondent-Mellon Mortgage Co.'s ("Mellon") mortgage escrow accounting practices in Hennepin County, Minnesota, District Court, in September 1992. In general, the action alleged that in its common course of servicing its mortgagors' escrow accounts, Mellon demanded and maintained excess deposits for payment of property taxes and insurance in violation of the limitations set forth in its mortgagors' standard form contracts and the Real Estate Settlement Procedures Act. 12 U.S.C. § 2609, and failed to refund or credit identified surplus funds in those accounts. Ms. DeBoer's action sought to enjoin Mellon from requiring any of its mortgagors to establish or maintain an escrow account with a reserve for unanticipated increases in the items to be paid from the accounts in excess of the excess authorized by the underlying mortgage contract or federal law and to mandate the annual automatic refund of excess balances that had been impounded. The suit also sought to force Mellon to adjust its escrow accounts to ensure future compliance with such standards.

The action was subsequently removed to the United States District Court for the District of Minnesota, Chief Judge Diana Murphy presiding. The Court then placed this case before Magistrate Judge Jonathan Lebedoff as part of a group of similar cases where the parties had indicated a willingness to explore the possibility of settlement. Mellon, without conceding that its escrow accounting procedures were improper, indicated a desire to reach a reasonable compromise that would put an end to disputes about whether escrow

accounts had been maintained lawfully. A lengthy and quite complex negotiation followed which focused on three key substantive areas:

a) Mellon's escrowing practices and any surpluses it might be holding in current mortgagors' escrow accounts;

b) Mellon's escrow accounting practices going forward, and the provision of satisfactory assurance that all unrefunded excess balances would be refunded in the future; and

c) Mellon's responsibility for damages to the extent it had held escrow surpluses in the past without paying interest on such balances.

Following this process, and only after several months of negotiation under the Court's supervision, the parties moved for approval of their settlement. Under the settlement, Mellon agreed to conduct its escrow practices in the future pursuant to the mechanism set forth in the Settlement Agreement, including the automatic refunding of escrow account surpluses, and to pay a modest damage "rebate" constituting imputed interest on past over-escrowed balances.[1] The Agreement provided that payment requirements for escrow accounts would, in the future, be based upon a reasonable estimate of the amount of money needed to fund the escrow items to be paid as they became due; that this reasonable

[1] It is important to understand that the "damage" aspect of the case involved only imputed interest on past alleged over-escrowed sums, a relatively small sum where typical overages might, on an individual basis, be only a few dollars.

estimate would then be spread over twelve equal monthly payments; and that if, at the regularly scheduled next analysis of the account it was determined that the reasonable estimate was an over-estimate, and that surplus funds were in the account, the surplus would be automatically refunded, in full, to the mortgagor, unless it was too small for a refund to be economically feasible, in which case it would be available to meet escrow requirements for the following year. The injunctive provision requiring automatic refunding of overages, which was not occurring before this lawsuit forced its adoption, has and will result in millions of dollars being returned annually to members of the Class. Petition at A-11; SA at 46-48, 55-58, 84-86. Mellon also agreed to make a payment towards class counsel's fees and bear the cost of notice. Petition at A4; SA 91.

By order dated October 29, 1993, the United States District Court for the District of Minnesota held that the proposed settlement fell "within the range of reasonableness" and that the action was appropriate to preliminarily certify for settlement purposes under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) ("Rule 23(b)(2)" or "(b)(2)"). Notice of the settlement was mailed to all class members, approximately 300,000 mortgagors. SA 91 Petitioners Michael and Suzannne Crehan ("Petitioners" or "Crehans") were one of only five timely objections received from that huge class. Petition at A4.

Petitioners requested leave to enter an appearance with the District Court on March 7, 1994. JA 24. Petitioners submitted extensive memoranda, exhibits and affidavits objecting to the substantive terms of the settlement, adequacy of representation, class certification under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) opposed to Fed.R.Civ.P. 23(b)(3), and their inclusion within the class. JA 25-48; JA 105-110; JA

144-159; JA 165. Petitioners moved to intervene pursuant to Fed.R.Civ.P. 24(a) and 24(b) on April 11, 1994. JA 24.

The District Court granted final approval to the settlement on June 14, 1994. JA. 17-21 The merits of Petitioners' arguments were addressed by Judge Murphy and found to be lacking sufficient merit to warrant failing to approve the proposed settlement which granted substantial benefits to the class as a whole and was acceptable to hundreds of thousands of other class members.[2] JA 9-21. On July 5, 1994 the Court granted Petitioners' motion to intervene for the limited purpose of preserving the right to appeal the approval of the proposed settlement. JA 24.

The Eighth Circuit Court of Appeals considered Petitioners' comprehensive arguments addressing the merits of the action and upheld the District Court's order certifying the class under Fed.R.Civ.P. 23(b)(2) and Fed.R.Civ.P. 23(b)(1) and approving the settlement as fair, reasonable and adequate to the class. Petition at A1-A17. Specifically, the Court held that certification as a Rule 23(b)(2) class was appropriate as the class sought predominantly injunctive relief against Mellon's alleged over-escrowing practices, resulting in future benefits and savings to the class in the millions of dollars. Petition at A-7-A9, A-11-A12; SA at 46-48. Additionally,

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[2] The essence of the Crehans' objection was that the settlement involved the compromise of certain issues, rather than the abject capitulation of Mellon. The Eighth Circuit and the District Court, however, specifically recognized the risks of further litigation in approving the settlement as reasonable. Petition at A10-A11. *See, Attorney General v. Michigan National Bank*, 325 N.W.2d 777 (Mich 1982); *Burkhardt v. City National Bank*, 226 N.W.2d 678 (Mich Ct. App. 1975) (challenge to single-item analysis based upon language in Fannie Mae mortgage rejected).

certification under Fed. R. Civ. P. 23(b)(1) was upheld.[3] Petition at A7.

The Court found that the fact that modest monetary relief was obtained incidental to the predominant injunctive relief sought and obtained did not render certification under Fed.R.Civ.P. 23(b)(2) and 23(b)(1) inappropriate. Petition at A7-A8, A11-A12. *See also, Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982); *White*, 822 F.Supp. 1389, 1411 (D.Minn. 1993); *Robinson v. Lorillard Corporation*, 444 F.2d 791, 801-02 (4th Cir. 1971); *Probe v. State Teacher Retirement Sys.* 780 F.2d 776, 780 (9th Cir.) *cert denied* 476 U.S. 1170 (1986). Rather, the Court held that "when either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation." Petition at A-7, *citing*, *Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978). *See also, White*, 822 F.Supp. at 1409.[4] The

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[3] The present case was appropriate for certification under Rule 23(b)(1) as the threat of conflicting adjudications and incomparable standards, should parties be permitted to opt-out, carries the risk of subjecting Mellon to opposing and irreconcilable court orders. If individual mortgagors file separate actions seeking injunctive relief against Mellon's escrow practices there would be a substantial risk of inconsistent or varying adjudications which would result in incomparable standards of conduct for Mellon. One court could grant injunctive relief, while another may deny such relief and a third court may grant a material different form of relief. "Differing results in individual actions would impair the ability to 'pursue a uniform continuing course of conduct where pragmatic considerations require that Defendants act in the same manner to all members of the class." *White v. National Football League*, 822 F.Supp 1389, 1408 (D.Minn. 1993).

[4] *Van Gemert v. Boeing Corp.*, 259 F.Supp. 125, 130-31 (S.D.N.Y. 1966) *aff'd on separate grounds*, 573 F.2d 733 (2d Cir), *rehg granted*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980); *See also*, 1

Court found that the class representation and notice were adequate. Petition at A6, A9.

Significantly, the Eighth Circuit held that by submitting extensive memoranda to the District Court challenging the substance of the settlement and adequacy of representation, moving to intervene and reaffirming their position to the Court of Appeals, Petitioners submitted to the jurisdiction of the District Court and therefore had been afforded all minimum due process required under *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 & n.3 (1985). ("Essentially, the Crehans have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their briefs to the Court.") Petition at A8-A9. The Court held that Petitioners were not absent class members due to Petitioners' submission to the Court's jurisdiction, and therefore the issue left unresolved in *Shutts* as to whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief was really not at issue. The Crehans may have been many things below, but absent and unheard were neither of them. Petition at A7-A9.

2. Crehans' Virginia Action.

In August, 1993 Petitioners brought an independent suit against Mellon in the United States District Court for the Eastern District of Virginia asserting claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and common law fraud

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Herbert Newburg and Alan Conte, *Newburg on Class Actions*, § 4.20, at 4-71 (3d ed. 1992).

and seeking to recover $3,000,000.00 in punitive damages from Mellon. SA at 117-130. The Virginia court dismissed the Crehan's RICO claim with prejudice pursuant to Fed.R.Civ.P. 12(b)(6) and their fraud claim without prejudice under the doctrine of *United Mine Workers v. Gibbs*, 373 U.S 715 (1968). SA 117-130. In dismissing the action, the Virginia Court held that as a matter of law appellants could not recover punitive damages in excess of $50,000.00 based upon likely actual damages of less than $10.00 and "to a legal certainty" Petitioners' allegations that they disagreed with Mellon's accounting methodology did not amount to a fraud claim. (JA 121-22; SA 117-30) The District Court denied the Crehan's request to amend judgement and for leave to replead. *Crehan v. Mellon Mortgage Co.*, No. CA-93-1017-A (E.D.Va. Oct. 19 & Nov. 22, 1993). The United States Court of Appeals for the Fourth Circuit affirmed the District Court's orders in an unpublished opinion. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994)(table).[5]

In this petition, the Crehans argue that they should have been afforded the right to opt out of the class action settlement on their admittedly minute money damage claims and that the Federal Rules of Civil Procedure and the Constitution guarantee them those rights. A review of the facts of this case and relevant authorities reveals that there is not an absolute right to opt out of a class properly certified under Fed.R.Civ.P. 23(b)(2) and 23(b)(1), that due process was afforded the Crehans who submitted to the jurisdiction of

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[5] The Fourth Circuit's decision upholding the United States District Court for the Eastern District of Virginia's dismissal of the Crehan's Virginia action, and expressing skepticism towards the Crehan's claims further supports Mellon's defenses and therefore the adequacy and reasonableness of the approved settlement. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994)(table); SA at 117-130.

the District Court, that the Circuit Courts of Appeal are not divided on these issues, and therefore certiorari should be denied.

REASONS TO DENY THE WRIT

In an effort to invoke this Court's jurisdiction, the Petitioners attempt to create a conflict where there is none. Not a single one of the cases which Petitioners cite as being in conflict with the decision below involved class members in the position of Petitioners or even remotely similar facts. All involve carefully delineated and narrow applications of the same rule of law, that do not apply to the facts of this case. Since there is no direct, real or intolerable conflict among the Circuits on the issue presented, there is no foundation for review.

Consequently, this case does not provide a vehicle to consider the question of whether absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf. Petitioners have already been afforded due process and the Eighth Circuit's decision is not in conflict with the decisions of other Courts of Appeal.

I. The Eighth Circuit's Opinion Is In Harmony With Other Circuit Courts of Appeal, Since No Court of Appeals, Including the Ninth Circuit, Maintains That There Is An Absolute Right To Opt Out of A Rule 23 (b)(2) or Rule 23 (b)(1) Class Seeking Predominantly Injunctive Relief.

The first ground on which Petitioners seek reconsideration of the Eighth Circuit's decision below is their

contention that certification of Respondent DeBoer's damage claims is prohibited by Rule 23(b)(2) itself. Petitioners' argue that as a matter of law, they should have been provided the opportunity to opt out of the mandatory class certified under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) because the fact that the Class's claims seek some money damages, in addition to injunctive relief, renders those claims ineligible for Rule 23 (b)(2) certification.[6]

The law is clear, however, that "class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.) *cert. denied*, 476 U.S. 1170 (1986); *White v. National Football League*, 822 F.Supp. 1389, 1410 (D.Minn. 1993) *aff'd* 41 F.3d. 402 (8th Cir. 1994), *cert denied*, 115 S.Ct. 2569 (1995); *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). The definitive authority on the intended construction and application of the rule, the Rules Advisory Committee Notes to the 1966 Amendments to Rule 23 that added subpart 23(b)(2) clarify that a class may not be maintained under subpart (b)(2) where "the appropriate final relief relates exclusively or predominantly to money damages."*Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, reprinted at 39 F.R.D. 69, 102 (1966). *See, Arnold v. United Artists Theater Circuit,*

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[6] Ms. DeBoer, on behalf of the class self-evidently sought primarily equitable relief from Mellon's alleged over-escrowing practices. Petition at A3. Petitioners', however, continue to contend that DeBoer's claims and their own claims are primarily for monetary damages and are not for equitable relief. The Eighth Circuit readily disagreed with Petitioner's contentions and found the monetary relief sought "incidental" to the predominant injunctive relief sought and obtained. Petition at A7. This conclusion is supported by the record.

Inc., 158 F.R.D. 439, 461 (N.D.Cal. 1994). "Thus, unimpeachable authority dictates that money damage claims may be certified under (b)(2) so long as the monetary claims do not 'predominate' over the claims for declaratory or injunctive relief." *Arnold*, 158 F.R.D. at 461. *See, White v. National Football League*, 822 F.Supp. 1389, 1410 (D.Minn. 1993) *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994) *cert denied*, 115 S.Ct. 2569 (1995); *In re Jackson Lockdown. MCO Cases*, 107 F.R.D., 703, 713-14 (E.D.Mich. 1985).

In the instant action, both the Eighth Circuit and the District Court concluded that the cohesiveness of the class and the homogeneity of the class member's interests in seeking and obtaining predominantly injunctive relief against Mellon's alleged common, computer-driven over-escrowing practices were the salient factors on which the availability of the (b)(2) class action was based. Petition at A7. "The fact that damages were sought incidentally to the prayer for injunctive relief [did] not affect this result." *Id. citing, Paxton v. Union National Bank*, 688 F.2d 552, 563 (8th Cir. 1982). *See, White*, 822 F.Supp. at 1410-11. The injunctive benefits were estimated to be in the millions of dollars, considerably more significant than the modest monetary relief. Petition at A-11; SA at 44-48.

In contrast to a class certified under Fed.R.Civ.P. 23(b)(3), under Fed.R.Civ.P. 23(b)(1) and Rule 23(b)(2), there no absolute right to opt-out of the class action. Fed R. Civ. P. 23(1)(2). *White*, 822 F.Supp. at 1410-12, aff'd 41 F.3d 402, 407-09 (8th Cir. 1994); *United States v. United States Steel Co.*, 520 F.2d 1043, 1057 (5th Cir. 1975). Under Fed.R.Civ.P. 23(d)(2), however, the Court is vested with the discretion to require notice and other procedural safeguards that are not mandated under Rule 23 or the constitution. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981). This discretionary power permits courts to allow

exclusion in Rule 23(b)(1) and (b)(2) class actions whenever the court deems it appropriate. The Circuit Courts of Appeal are not divided on this issue as no Court of Appeals has held that there is an absolute right to opt-out of a class certified under Fed.R.Civ.P. 23(b)(1) and Rule 23(b)(2) which only includes monetary relief incidental to the predominant injunctive benefits sought. *See e.g., Report and Recommendations of the Special Committee On Class Action Improvements,* 110 F.R.D. 195, 206-07 (1986). Such a right only arises when a Court exercises its discretion to permit opt-outs.[7]

This is demonstrated by the very cases relied on by Petitioners to show class members in certain circumstances have been permitted to opt-out of mandatory classes. Each case relied upon by Petitioners is merely an example of the court using its discretionary power under Fed.R.Civ.P. 23(d)(2) to protect class member's interests as it deems necessary in the particular circumstances of those cases. *See, Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981), *cert denied*, 479 U.S. 883, 107 S.Ct. 274, 93

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[7] *See generally, Newburg on Class Actions* (3rd Ed. 1992) §16.17 No Absolute Right of Exclusion or Appearance for Class Members in Rule 23(b)(1) or (b)(2) Classes, at 16-91 - 16-98, *citing cases including, Penson v. Terminal Transport Co.*, 634 F.2d 989, 993-94 (5th Cir. 1981) and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), and stating: "The cohesiveness or unity theory has broken down somewhat "with the advent if the 'hybrid' Rule 23(b)(2) class action in which individual monetary relief for class members, typically back pay, is sought in addition to classwide injunctive relief, and some courts have held that 'where monetary relief is sought and is made available in a Rule 23(b)(2) class action, "notice is no longer discretionary but is required at some stage in the proceedings, though the right to opt out of the suit has remained subject to the discretion of the court, even when monetary relief is sought and available."

L.Ed.2d 250 (1986)("The conclusion to be drawn from the above survey of the law is that a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, even where monetary relief is sought and made available....A district court, however, acting under its Rule 23(d)(2) discretionary power, may require that an opt out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members.")[8]; *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983)(Absent class members of Rule 23 (b)(2) class have no automatic right to opt out of lawsuit and to prosecute entirely separate action: In certain instances, however, parties themselves or court in its discretion under Rule 23(d)(2), may provide for such procedure). *See also, Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987)(same); *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994)(no absolute right to opt-out of Rule 23(b)(2) class); *Grimes v. Vitalink Communication Co.*, 17 F.3d 1553 (3rd Cir.)(notice of class action plus opportunity to be heard and participate in litigation is all that is needed to satisfy due process rights of non-resident class members with sufficient contacts with forum, even if members were not given opportunity to opt out of class), *cert. denied*, 115 S.Ct. 480 (1994). Therefore, case law unanimously holds that while an opt out right may be made available in a Rule 23(b)(2) or (b)(1) class, it is done by discretion of the court pursuant to Rule 23(d)(2) rather than any mandate in the Federal Rules of Civil Procedure.

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[8] In an opinion that was released almost simultaneously with *Penson*, the Fifth Circuit held that "the right to opt out, which is denied when a Rule 23(b)(2) case is tried, also need not be provided when such a case is settled." *Kincaide v. General Tire and Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

Petitioners' argument that a mandatory right to opt out of a Rule 23(b)(2) action such as the case at Bar exists is based entirely on Petitioners' false premise that the predominant relief sought and afforded in this case was monetary damages, rather than injunctive relief. The Eighth Circuit made clear, however, that the damage claims in the instant action were clearly incidental to the predominant injunctive benefits sought and obtained by the settlement. Petition at A7, A11-A12. Petitioners' misinterpretation of the settlement cannot form the basis for their petition. As a result, certiorari should be denied.

II. The *Shutts* Issue Does Not Arise With Regard To Petitioners' Claims As Petitioners Were Not Absent Class Members and Were Afforded Minimum Due Process Having Received Adequate Notice; Moved To Intervene Under Fed.R.Civ.P. 24, and Participated Extensively in the Settlement Process Through the Submission of Legal Memoranda Arguing the Substantive Issues Litigated, Adequacy of Representation and the Right To Be Excluded.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the question presented. The Petitioners' question presented suggests that the District Court below found Petitioners to be absent class members and that the predominant relief sought and obtained in the class action was monetary damages rather than injunctive relief.[9] *See*,

[9] In their petition, Petitioners continue to misconstrue the settlement terms for the Court by ignoring the injunctive benefits conferred and emphasizing the modest monetary relief. For example, Petitioners claim: "Rather, the settlement rewrites each class member's individual mortgage contract to conform to Mellon's past practices and to allow Mellon to

Petition, "Question Presented for Review," at i. This suggestion is incorrect.

Based on these erroneous assumptions, Petitioners dispute the court's exercise of jurisdiction over them as objecting class members. Specifically, Petitioners contend that the District Court and Eighth Circuit erred in failing to apply the standard set forth by the Supreme Court in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985), which required that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court in cases seeking primarily monetary damages.

Contrary to Petitioners' suggestion, this case does not present any due process problems in the composition of a mandatory class. As the Eighth Circuit correctly held, Petitioners were not absent class members and had been afforded due process unlike the situation in *Shutts, supra* and

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retain more than it had been contractually permitted to retain at the time the suit was filed."

Petition at 3.

Petitioners' statements are misleading as recognized by the Eighth Circuit below, which addressed the deficiencies in Petitioner's interpretation of the settlement, stating: "Interpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe and the FNMA form does not require the automatic refunding that is now available to the class....The settlement does not allow Mellon to increase anyone's loan obligation." Petition at A12.

Moreover, Petitioners' illogically complain that the parties' settlement, negotiated and approved in 1993, failed to confer any benefit on the class since new regulations were subsequently promulgated by HUD in May, 1995 which require some of the benefits negotiated and obtained in this private settlement two years earlier.

Brown, infra, and, in addition, monetary relief did not predominate. Petition at A7-A9 ("Nor must we today decide the question whether a suit seeking equity can bind a putative class member, thus preventing a subsequent suit for damages . . . because the Crehans are not absent plaintiffs in this action"). *See also, White,* 41 F.3d at 407.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75 & n.3 (1985) the Supreme Court left open the question of whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. However, the Eighth Circuit below correctly held that this qūestion was unnecessary to address when objectors such as the Crehans' had fully submitted to the Court's jurisdiction and were fully and formally heard on the substantive issues of the litigation and adequacy of representation. Petition at A7-A9. No Court of Appeal is in conflict with this position. *See, White v. National Football League,* 822 F.Supp. at 1410-12, 836 F.Supp 1501-04, *aff'd,* 41 F.3d 402, 407-08 (8th Cir. 1994)(Each objector had minimum contacts with forum or subjected themselves to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony and filing numerous memorandums of law regarding the settlement); *Grimes v. Vitalink Comm. Corp.,* 17 F.3d 1553, 1560 n.8 (3d Cir.)(concluding that due process protections "bind absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert denied,* 115 S.Ct. 480, 130 L.Ed.2d 393 (1994); *In re Real Estate Title and Settlement Serv. Antitrust Litig.,* 868 F.2d 760, 770-71 (3d Cir. 1989)(noting that in the context of a mandatory class action "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the

District Court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum"), *cert denied,* 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed. 44 (1989); *Trans World Airlines Inc. v. Mattox,* 897 F.2d 773, 786-77 (5th Cir. 1990)(concluding that arguments made by intervenors which went "to the heart of the issue before the district court" waived any objection to personal jurisdiction of the court); *Sandler Assoc. v. Bellsouth Corp.,* 818 F.Supp. 695, 705-06 (D.Del. 1993)("[P]laintiffs were in no sense 'absentee' class members" after litigating objections to the settlement in the district court exercising constitutionally adequate opportunity to be heard, and commencing separate lawsuit: It was not a denial of due process to prohibit group of plaintiffs from opting out of certified class in state litigation and pursuing exclusive federal damages claim where such plaintiffs were parties to and actively participated in consolidated class action and consented to court's jurisdiction in objecting to class certification and settlement as plaintiffs were given and vigorously exercised constitutionally adequate opportunity to be heard on issue); *Network Professional Inc. v. Network Int'l Limited,* 146 F.R.D. 179, 184 (D.Minn. 1993)(even if defendants had properly raised jurisdictional defenses in their answer they clearly waived the defence by participating the lawsuit); *See also, Reynolds v. National Football League,* 584 F.2d 280, 285 (8th Cir. 1978)("The appellants were duly advised of this proceeding and of the proposed settlement and were afforded a full opportunity to present objections. Due process requires no more").

For a court to exercise personal jurisdiction, the party must have minimum contacts with the forum such that the maintenance of the suit does not violate "traditional nations of fair play and substantial justice." *International Shoe Co. v.*

Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) *citing Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940). This personal jurisdiction requirement is not an Article III restriction on the federal courts, but rather an individual liberty interest flowing from the Due Process Clause. *Insurance Corp. of Ireland, Ltd. et al. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). Like other such rights, the personal jurisdiction requirement can be waived. *Id.* at 703, 102 S.Ct. at 2105. Fed.R.Civ.P. 12(h) contemplates the involuntary waiver of a defence of lack of personal jurisdiction if it is not included in a motion or in a responsive pleading. Moreover, the rule "sets only the outer limits of waiver; it does not preclude waiver by implication." *Yedell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990), *citing Marquest Medical Prods. v. EMDE Corp.*, 496 F.Supp. 1242, 1245 n.1 (D.Col. 1980). Therefore, while a party to a mandatory class action who appears in court to contest inclusion in a class is analogous to a party who appears merely to contest jurisdiction and does not waive the jurisdictional objection, the party will be deemed to consent to jurisdiction if it actually litigates the adequacy of class representation or the underlying merits of the case. *White*, 41 F.3d. at 407-08, *citing Yedell*, 913 F.2d at 539 and *In re Real Estate*, 869 F.2d at 777-71.[10]

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[10] The primary case relied upon by Petitioners, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), writ dismissed as improvidently granted, 114 S.Ct. 1359 (1994) does not create any conflict as that decision in no manner held there was an absolute right to opt-out of a Rule 23(b)(2) class after fully arguing the merits if the settlement to the court. Significantly, in *Brown*, the party effected by the preclusive effect of the prior action was an absent class member who did not participate in any manner in the original action, unlike Petitioners in the instant action. *Brown*, 982 F.2d at 392, 114 S.Ct. at 1361. *Brown*, therefore is

Shutts only mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff and damage claims predominate. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992)(*citing Shutts*, 472 U.S. at 811-12). In the present case, there exists no absent class members whose due process rights must be protected in the fashion described in *Shutts*, since each of the Petitioner-objectors was subject to the jurisdiction of the District Court and more than fully heard.

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consistent with the Eighth Circuit's decision below, and decisions of other Circuits in permitting an opt-out right to absent class members in Rule 23(b)(2) classes in certain circumstances under its Rule 23(d)(2) discretionary power.

Moreover, in *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994), a decision rendered subsequent to *Brown*, the Ninth Circuit itself failed to cite *Brown* for the broad reaching effect Petitioners rely. The Ninth Circuit in *Crawford* made clear that it did not decide due process mandates the right to opt out of a Rule 23(b)(2) class, although a court in its discretion may provide such a right:

> Depending on the type of class action suit, due process may require other safeguards in order for absent class members to be bound by the judgment. For example, the due process required in order to bind known class members in a class action suit for money damages includes adequate notice to the absent class members, adequate representation and an opportunity for the member to opt out of the suit. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Larry P.*, however, was a class action for injunctive relief certified under Fed.R.Civ.P. 23(b)(2) which does not require notice or permit members to opt out, although a court in its discretion may provide for an opt-out or notice. *See* Fed.R.Civ.P. 23(b)(2); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 n.3 (9th Cir. 1985). In a Rule 23(b)(2) class action for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone. *See, Besinga v. United States*, 923 F.2d 133, 137 n.7 (9th Cir. 1991).

Thus, the narrow holding of *Shutts* has no direct application with respect to these Petitioners. Petition at A7-A9.

Furthermore, the Circuits are not divided in holding opt out rights are not constitutionally mandated in cases where sufficient alternative procedural safeguards have been employed. For instance, in *White* such procedural safeguards were found to be satisfied where the objectors were: (1) adequately represented by the named plaintiffs; (2) adequately represented by capable and experienced class counsel; (3) provided with adequate notice of the proposed settlement; (4) given the opportunity to object to the settlement; and (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate. *White*, 41 F.3d at 407-08 *citing*, *White*, 836 F.Supp. at 1472-73, and *White*, 822 F.Supp. at 1411-12. *See*, *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994); *Williams v. Burlington Northern Inc.*, 832 F.2d 100, 104 (7th Cir. 1987), *cert denied*, 485 U.S. 991, 108 S.Ct. 1298, 99 L.Ed.2d 508 (1988)(although plaintiff did not have the right to opt out, court "provided [plaintiff] with the equivalent due process protection that would be accorded to a Rule 23(b)(3) class member"), *Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. Supr. 1989)("we have concluded that when a portion of the relief which is sought is monetary, a member of a class certified under Rule 23(b)(2) has a Constitutional due process right to notification but not a right to opt out of the class."); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991)(same, dicta); *Robertson v. National Basketball Assoc.*, 556 F.2d 682, 685-86 (2d Cir.

1977)(discussing due process rights of mandatory class members prior to *Shutts)*.[11]

In the present action, the Eighth Circuit found the above-referenced elements satisfied. Petitioners participated extensively in the settlement process by moving to intervene pursuant to Fed.R.Civ.P. 24(a) and 24(b), by filing an extensive 24 page legal memorandum, by filing two reply memoranda with extensive charts and graphs objecting to the merits of the proposed settlement, adequacy of representation and class certification under Fed.R.Civ.P. 23(b)(1) and 23(b)(2). JA 25-49, 105-110, 144-158, 165, 169-74, and finally by being fully heard on appeal. Petitioners appealed the District Court's order to the Eighth Circuit Court of Appeals and personally appeared to argue their position. As in the above-referenced decisions, Petitioners fully addressed "the heart of the issues before the district court" which amounted to a knowingly and voluntary submission to the court's jurisdiction. As a result, due process has been afforded. Petitioners simply cannot claim they were denied an adequate opportunity to be heard. Contrary to Petitioner's position, and as recognized by the Eighth Circuit, the District Court had appropriate jurisdiction to properly consider the arguments of Petitioners attacking the substance of the settlement and adequacy of representation. As there is no division amongst the Circuits on this issue, certiorari should be denied.

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[11] *See also*, 1 Herbert Newburg and Alan Conte, *Newburg on Class Actions*, § 1.20, at 1-48 (3d ed. 1992).(discussing impact of *Shutts)*.

III. The Eighth Circuit's Decision Below, Is Not At Odds With the Ninth Circuit's Decision in *Brown v. Ticor Title Ins. Co.* Nor *Shutts.*

In addition to arguing that the Eighth Circuit's decision in this case violated Fed.R.Civ.P. 23(b)(2) itself, Petitioner's charge that the certification of the plaintiffs' damage claim under Rule 23 (b)(2) was unconstitutional. Petitioners argue that the due process clause of the federal Constitution requires that an absent class member, with any kind of money damage claim must absolutely be afforded an opportunity to opt out.[12] Petitioner argue they were denied due process when they were not given the right to opt out of the instant action.

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[12] The Supreme Court has stated that "'[d]ue process,', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* (quoting) *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). Due process is satisfied, therefore, if the procedures which are followed are "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard', to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349, 96 S.Ct. at 909 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970).

In the case at Bar,the Eighth Circuit found due process had been afforded Petitioners as they were provided notice, extended the opportunity to be heard fully and completely on the merits which they vigorously exercised. Petition at A7-A9.

In support of their claims, Petitioners rely upon *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), where the Ninth Circuit held that under certain circumstances it violates due process to litigate damage claims of absent class members without giving them notice and a chance to opt out. *Brown*, 982 F.2d at 392. The opinion relies entirely on *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985), in which the Supreme Court held that, in order to bind known plaintiffs concerning claims "wholly or predominantly" for money damages, minimal due process -- meaning notice and an opportunity to be heard and participate in the litigation must be provided. *Id.* at 811-13 & n.3. As the decision in *Brown* explicitly acknowledges and stresses, however, "*Shutts*, is limited to claims 'wholly or predominantly for money damages.'" *Brown*, 982 F.2d at 392 (*quoting Shutts*, 472 U.S. at 811 & n.3). In particular the Supreme Court stated: "[w]e intimate no view concerning other types if class actions, such as those seeking equitable relief." *Shutts*, 472 U.S. at 811 & n3.[13] Thus, under *Shutts* and *Brown*, the constitutional due process requirement of notice and a right to opt-out applies only to cases where claims for monetary damages "predominate". Unlike the instant action, the Ninth Circuit in *Brown* specifically recognized that "substantial damage claims" were at issue. *Brown*, 982 F.2d at 392. Since class certification under Rule 23(b)(2) is permitted only where

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[13] The footnote in *Shutts* represents at least the second time that the Supreme Court has expressly declined to extend a due process analysis to class actions for injunctive or declaratory relief maintained under Fed.R.Civ.P. 23(b)(2). The first instance involved a requirement for individual notice in a Rule 23(b)(3) class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 & n.14, 94 S.Ct. 2140, 2151-52 & n. 14, 40 L.Ed.2d 732 (1974)."By its terms subdivision [23](c)(2) is inapplicable to class actions for injunctive or declaratory relief."

monetary damage claims do not predominate, *Brown's* due process based holding adds nothing to the limits on the availability of the (b)(2) form that are not already imposed by the rule itself. *See, Arnold*, 158 F.R.D. at 463.[14]

In *White v. National Football League*, 822 F.Supp. at 1410-12 (D.Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994) the Court distinguished the Ninth Circuit's decision in *Brown* and reached the same conclusion as the case at Bar. ("At most, *Brown* stands for the proposition that where a class action involves claims "wholly or predominantly" for money damages, and where the settlement of such class action accords only injunctive relief and no damage recovery, an absent nonresident class member's later claim for damages will not be barred.") The Court therefore, concluded that *Brown* had no application where: (1) the plaintiff classes' claims are predominantly injunctive in nature, and (2) the relief provided for by the terms of the settlement, although predominantly injunctive, also included payments to settle the damage claims of individual class members. *White*, 822 F.Supp. at 1412.

Given the fact the Eighth Circuit below found the claims asserted to be predominantly injunctive in nature, as in reality they are, and Petitioners not to be absent class members, as in reality they are not, unlike the situations in *Brown* and *Shutts*, certiorari should be denied.

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[14] The present settlement is also distinguishable from the settlement challenged in *Brown* because *Brown* involved class claims that were "wholly or predominantly" for money damages, yet the challenged settlement provided no damages recovery, but only injunctive relief. *Brown*, 982 F.2d at 392. *See, White*, 836 F.Supp. at 1471-72 & n. 31. The instant action involved claims for predominantly injunctive relief. Petition at A-3.

IV. Petitioners Mischaracterize the Nature of the Underlying Action and Settlement By Ignoring the Predominantly Injunctive Relief and Emphasizing the Ancillary Monetary Relief in Arguing That Only Certification Under Fed.R.Civ.P. 23(b)(3) Is Proper.

In their petition for a writ of certiorari, petitioners misconstrue the nature of the underlying action and predominant relief sought. Appellants arguments opposing the District Court's certification under 23(b)(1) and 23(b)(2) ignore the broad scope of this action, specifically the injunctive relief claimed, and concentrate solely on the ancillary monetary damages obtained.

In the present case, it is clear that the predominate remedy sought by the class was injunctive in nature. The complaint clearly requested the Court to grant judgement;

1. Declaring that Defendant's escrow account practices violate §10 of RESPA, and that Defendant may not require mortgagors to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less;

2. Permanently enjoining Defendant from requiring any mortgagor to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less;

3. Directing Defendant to recalculate for each mortgage held or serviced by them in the amount of each mortgagor's escrow balance, and to make such

> adjustments as are necessary to ensure that the balance in the escrow account does not exceed the RESPA ceiling or amount authorized by the underlying mortgage contract, whichever is less, and to pay to the mortgagor a refund of any excess balances plus interest.

JA at 195; Petition at A3, A7

The request for this injunctive relief found in these prayers, setting forth a standard of conduct for Mellon to follow, is undoubtedly the predominant relief sought since it will affect more persons and will have consequences over a longer time period than the monetary award. *Id.* The automatic refund of overcharged amounts, establishment of a standard of conduct for escrow servicing in the future, and institution of a monitoring mechanism is clearly predominant to the monetary damages sought in the form of interest payments on the excessive balances previously maintained. *Id.* Petition at A 11

Moreover, Courts have upheld the applicability of Rule 23(b)(2) when both the injunctive damages and relief sought were of equal importance. *See generally, Souza v. Scalone*, 64 FRD 654 (ND Cal. 1974); *Ventura v. New York City Health & Hosps. Corp.*, 125 FRD 595, 601 (SDNY 1989) (A class action under Rule 23(b)(2) "may be appropriate where a monetary award is but one element of an equitable remedy.") It is only where damage relief is exclusively sought or clearly the predominant form of relief requested that the case can be said to clearly fall outside the scope of Rule 23(b)(2), and thereby constitute an abuse of discretion on part of the District Court to certify it as such. As the complaint demonstrates, that is clearly not the case here.

Appellants erroneously characterize this action as primarily a damage case. The damage or "rebate" part of the class settlement, representing an interest payment on past surpluses, is in truth, a small part of this settlement. Because denial of the use of funds is the only measure of damages for past over-escrowing, these numbers are never going to be large. The primary relief in this and other similar cases is injunctive. The future escrow practices and the automatic refunds of current and future surplus funds (as opposed to interest on surplus funds), both flow solely from the injunctive aspect of the case, and involve tens of millions of homeowners' dollars. In short, the injunctive relief drives the entire case. Appellants' reference to this as primarily a damage case, from which their entire analysis flows, is simply wrong.

CONCLUSION

The petition for certiorari should be denied.

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No. 95-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN AND
SUZANNE TETREAULT CREHAN

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*
and MELLON MORTGAGE COMPANY,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*
and MELLON MORTGAGE COMPANY,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

Petitioners Michael Crehan and Suzanne Crehan seek review of a ruling of the Eighth Circuit, which denied them the right to opt out of a class action settlement. The petition explained that the courts of appeals are in conflict on whether Federal Rule of Civil Procedure 23 and the Due Process Clause require that class members be given the right to opt out and to litigate their money damages claims individually. As discussed in the petition, the due process issue presented here is the same question upon which this Court granted

review in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994).

In *Ticor*, the Court noted that there was a "substantial possibility" that Rule 23(b)(3) provided class members with "a right to opt out of any class action which asserts monetary claims on their behalf." *Id.* at 1361. Because the Rule 23 issue was not presented in *Ticor*, and a decision requiring an opt out based on the Rule would have obviated the need to reach the constitutional question, the Court dismissed the writ of certiorari as improvidently granted. *Id.* at 1362.

In their briefs in opposition, respondents Gretchen DeBoer and Mellon Mortgage Company do not deny that this case presents an opportunity to consider the Rule 23(b)(3) question and, if necessary, the constitutional question upon which review was granted in *Ticor*. Rather, respondents argue that there is no conflict among the courts of appeals on these questions and that petitioners "waived" their constitutional opt-out rights by filing objections to the class action settlement while also asserting their rights to opt out of it. *E.g.*, DeBoer Opp. 18. In this regard, respondents contend that the only way in which petitioners could have challenged the denial of their rights to opt out under the Due Process Clause was to stay out of the settlement proceedings entirely, and collaterally attack the settlement in another proceeding. But if petitioners took that approach, as *Ticor* teaches, 114 S. Ct. at 1361-62, they could not have raised the Rule 23 issue on collateral review. In short, according to respondents, there was no way for petitioners to preserve their right to litigate both issues, an odd result given that the

writ of certiorari in *Ticor* was dismissed on the ground that only the due process issue was presented. Thus, respondents' approach puts petitioners in a Catch-22 position that this Court should reject. Moreover, as we now show, respondents are in error when they assert that the courts of appeals are not in conflict over the issues presented.

1. Rule 23.

Whether judged by the complaint or the settlement agreement, respondents are simply wrong that the damages aspect of this case was properly certified under Rule 23(b)(2) on a non-opt-out basis. The complaint sought both monetary damages suffered by the class on account of Mellon's unlawful escrow practices and an injunction. Eighth Circuit Joint Appendix ("JA") 193.

Respondents are correct that the damages relief actually awarded in the settlement is meager (about 35 cents per class member), but it is the *preclusion* of the class members' damages claims that is the principal achievement of the settlement agreement. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). Under the settlement, each class member is forever barred from recovering their actual losses, special compensatory damages, and punitive damages based on Mellon's unlawful practices. *See* Settlement Agreement, ¶ 32, JA 244-45. Further, the "injunctive relief" obtained by the class does not *require* Mellon to do anything; rather, it *permits* Mellon to escrow the maximum amount then allowed by federal law (a two-month escrow reserve) and *rewrites* each class members' contract if, as was

the case for petitioners, the escrow reserve permitted by the contract was lower than the statutory maximum. JA 229-32, 237; *see also* Complaint, ¶ 11, JA 188 (terms of some class members' mortgage contracts required escrow reserves to be lower than the statutory maximum).

At the very least, respondents do not deny that this case involves both injunctive relief *and* damages. They assert, however, that, where both forms of relief are present in a class action, it is preferable to certify the class solely under Rule 23(b)(2), which does not provide the class members a right to opt out. It is true that the Eighth Circuit below and other courts of appeals have held that the non-opt-out subdivisions of Rule 23(b) should take precedence over Rule 23(b)(3) whenever both damages and injunctive relief are present. *See* Pet. App. 6a; *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). However, respondents ignore the decisions of other courts of appeals which have taken the opposite position—that, where individual damages claims are present, class members must be accorded Rule 23(b)(3)'s notice and opt-out rights. *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *see also Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *McDonnell Douglas Corp. v. United States Dist. Court*, 523

F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).*

In this regard, respondents misconstrue petitioners' reliance on cases such as *Penson*, 634 F.2d 989, and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). Respondents claim that these cases are inapposite because they involved class certifications under Rule 23(b)(2) in which opt-out rights were provided as a matter of discretion, not of right. But that begs the question. The essential problem here is not which subdivision of Rule 23(b) was chosen by the district court, but whether opt-out rights had to be accorded the class members. As the court in *Penson* put it, when individual monetary relief is sought, the case "begins to resemble a 23(b)(3) action and there has been more concern [there] with protecting the due process rights of the individual class members...." 634 F.2d at 994. Here, substantial monetary damages were at stake and, while it might not have been impermissible for the court to have

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* Indeed, contrary to respondents' protestations that this case is a classic injunctive-relief class action in which Rule 23(b)(3) certification is inappropriate, counsel for respondent DeBoer have sought and obtained class certification under Rule 23(b)(3) in other class actions alleging the identical causes of action, and they have settled those claims for exactly the same kind of relief as in this case, while providing an opt-out right. *See, e.g., Lake v. First Nationwide Bank*, 900 F. Supp. 726, 731 (E.D. Pa. 1995); *Bovey v. Lumbermen's Investment Corp & Temple-Inland Mortgage Corp.*, No. 4-91-766 (D. Minn. Apr. 1, 1993).

styled the class certification as one under Rule 23(b)(2), the court had to permit the class members to opt out to pursue their individual damages claims.

Assuming, therefore, that there was a legitimate injunctive aspect to this settlement that could be said to warrant certification under Rule 23(b)(2), at the least, the damages aspect of the case should have been separately certified under Rule 23(b)(3). *See Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); 1 *Newberg on Class Actions* § 4.14, at 4-51 - 4-52 (3d ed. 1992). The courts of appeals are split on whether such dual certification is permissible. And even if that is not permissible, as noted by this Court in *Ticor*, there is a "substantial possibility" that *all* class actions seeking monetary damages must be certified under Rule 23(b)(3), which is a more than sufficient reason to grant review in this case.

Finally, as noted in the petition (at 15-16), but ignored by respondents, the complaint sought relief on behalf of *former* (as well as current) Mellon customers, Complaint, ¶ 2, JA 186, and the settlement agreement separately provides for their damages relief. JA 234-35. With respect to these class members (including the petitioners here), there is no question of whether the injunctive relief "predominates" over the damages relief or vice versa; their claims are solely for money damages. On that score alone, the Eighth Circuit's ruling is irreconcilable with the decisions of other courts of appeals holding that, under Rule 23, class members must be

accorded the right to opt out with respect to their claims for money damages.

2. Due Process.

Respondents make two arguments in an effort to avoid the due process issue squarely presented by this case. First, they claim that there is no conflict between the denial of petitioners' opt-out rights in this case, Pet. App. 18a, and the decision of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (1992). In fact, *Brown* stated in no uncertain terms that opt-out rights must be afforded in a class action "if monetary claims are involved," and specifically held that due process requires that class members be permitted to opt out in a "hybrid suit" involving both injunctive and damages claims. *Id.* at 392; *see also id.* (class members must be permitted to opt out where settlement involves "the *foreclosure of substantial damages claims*")(*quoting In re Real Estate & Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989)). More importantly, this Court understood the Ninth Circuit's ruling to say exactly that. *See Ticor*, 114 S. Ct. at 1361; *id.* at 1362 (O'Connor, J., dissenting). In sum, the due process question here is worthy of review, since it is precisely the question upon which this Court granted review in *Ticor*.

Second, taking their cue from the Eighth Circuit, Pet. App. 8a, respondents assert that petitioners "waived" their due process challenge because, in addition to demanding the right to opt out, they alternatively objected to the fairness of the settlement. The petition explains in some detail why

there was no waiver here, not the least of which is that the waiver theory cannot be squared with this Court's due process ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *See* Pet. 18-22. Without repeating that explanation, the fundamental flaw in respondent's analysis warrants a brief discussion.

Respondents' waiver theory is premised on the notion that petitioners submitted themselves to the jurisdiction of the district court in Minnesota and, thus, voluntarily relinquished their due process claim. *See White v National Football League*, 41 F.3d 402, 407-08 (8th Cir.), *cert. denied*, 115 S. Ct. 2569 (1995). But petitioners' due process claim has nothing to do with whether they established minimum contacts with Minnesota. Petitioners maintain that the Due Process Clause gives them (as well as Minnesota residents who are members of the class) a right to opt out of any class action in which substantial damages claims are at issue so that they can litigate those claims on their own. *See Shutts*, 472 U.S. at 812. There was no "waiver" by petitioners when they filed papers objecting to a settlement that abrogated that right.

CONCLUSION

For the foregoing reasons and those set out in the petition, the petition for a writ of certiorari should be granted.

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